IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DAVID MILLER,

Petitioner,

vs.

LARRY FIELDS, Oklahoma Department of Corrections,

Respondents.

No. 95-C-728-B

ORDER

Petitioner, a state prisoner, has filed a motion for leave to proceed in forma pauperis, a petition for a writ of mandamus under 28 U.S.C. § 1361, and a motion for a temporary restraining order. In his petition, Petitioner requests an order compelling the Oklahoma Department of Corrections to provide a three-member panel for disciplinary hearings as set out in Battles v. Anderson.

Even if the Court liberally construes Petitioner's action as a one in the nature of mandamus,[1] the Court lacks subject matter jurisdiction to compel Larry Fields, an officer of the State of Oklahoma, to perform a duty owed to Petitioner. See 28 U.S.C. § 1361 (providing that federal court has jurisdiction to compel an officer or employee of the United States to perform a duty owed to plaintiff). Accordingly, Petitioner's action in the nature of mandamus is hereby **dismissed for lack of subject matter jurisdiction**. Petitioner's motion for leave to proceed in forma pauperis (docket #2) is **granted** and his motion for a temporary

[1]The writ of mandamus has been abolished, see Fed. R. Civ. P. 81(b)

restraining order is **denied as moot**. The Clerk shall **mail** to Petitioner a copy of his petition for a writ of mandamus.

SO ORDERED THIS 9th day of Aug, 1995.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 9 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

DIAN WEDDLE AND MICHAEL WEDDLE, individually and as husband and wife,

Plaintiffs,

vs.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, a New Jersey corporation,

Defendant.

No. 95-C-336-K

ENTERED ON DOCKET

DATE AUG 10 1995

O R D E R

Now before the Court is Defendant's Motion for Summary Judgment or Alternatively to Dismiss and/or Strike. The Defendant filed its motion on May 3, 1995. This Court allowed the Plaintiffs until June 7, 1995 to respond to the Defendant's motion. Among other arguments, Defendant asserts in the motion that it is not a proper party defendant under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 et seq.

Under Local Rule 7.1(c) the matter is deemed confessed by the Plaintiffs. Thus the court grants Defendant's motion for summary judgment.

ORDERED this 8 day of August, 1995.

Terry C. Kern

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

10

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DIAN WEDDLE AND MICHAEL WEDDLE

Plaintiff,

vs.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Defendant.

No. 95-C-336-K

JUDGMENT

This matter came before the Court for consideration of the Defendant's motion for summary judgment. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the Defendant and against the Plaintiff.

ORDERED this 8 day of August, 1995.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHER DISTRICT OF OKLAHOMA

FORE SOLUTIONS, INC., an Oklahoma corporation and SUNBELT CAPITAL ASSOCIATES, INC., an Oklahoma corporation,	)	
Plaintiffs,	)	
v.	)	Case No. 94-CV-183-H
LOGICAL SOLUTIONS, INC., a Texas corporation, and LARRY H. SMITH, an individual,	)	
Defendants.	)	

CONFIDENTIALITY ORDER AND DISMISSALWITH PREJUDICE

The Court having considered the joint motion of Plaintiffs and Defendants for a confidentiality order and stipulated dismissal with prejudice, finds that the joint motion should be and is hereby granted.

This Court finds that the parties have executed a settlement agreement and that unless required to do so by order of a court or regulatory body of competent jurisdiction, they will refrain from disclosing to any person or entity the terms of the settlement agreement. Notwithstanding this restriction, the parties may advise third persons and entities that there has been a settlement of this lawsuit and that the litigation has ended. This restriction shall not be construed as prohibiting any party from disclosing, in the normal course of business, the terms of the settlement agreement to financial institutions, lawyers, other consulting personnel or government agencies.

The Court further finds that all claims of **Plaintiffs** and all counterclaims of Defendants which were or which could have been asserted in the **captioned** suit are dismissed with prejudice.

IT IS SO ORDERED this 9th **day of** August, 1995.

S/ SVEN ERIK HOLMES

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JEAN NEWMAN,

Plaintiff,

v.

DONNA E. SHALALA,
Secretary of Health and
Human Services,

Defendant.

NO. 94-C-3-M

JUDGMENT

Judgment is hereby entered for the Defendant and against the Plaintiff. Dated this 8th day of AUG, 1995.

Frank H McCarthy
FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOHNNY MOORE,

Plaintiff,

v.

DONNA E. SHALALA, Secretary of Health and Human Services,

Defendant.

NO. 94-C-23-M

JUDGMENT

Judgment is hereby entered for the Defendant and against the Plaintiff. Dated this 8th day of Aug, 1995.

Frank H McCarthy

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

15

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 9 - 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

THEOPHILUS FLEMING,

Plaintiff,

vs.

STANLEY GLANZ, et al.,

Defendants.

No. 95-CV-710-BU

ENTERED ON DOCKET

DATE AUG 10 1995

ORDER

On August 8, 1995, the Court received a letter from Plaintiff requesting this Court to "disregard" the instant civil rights complaint, filed on July 31, 1995, because it is incomplete.

After liberally construing Plaintiff's letter as a motion to dismiss without prejudice, the Court concludes that the same should be granted. Accordingly, the instant action is hereby **dismissed without prejudice**. The Clerk shall mail to Plaintiff the extra copies of his complaint and a complete civil rights package.

SO ORDERED THIS 9th day of August, 1995.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

2

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 9 - 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

BILLY GENE MARSHALL,

Plaintiff,

vs.

RON CHAMPION, et al.,

Defendants.

No. 94-C-866-BU

ENTERED ON DOCKET

DATE AUG 10 1995

JUDGMENT

In accord with the Order granting Defendants' motion for summary judgment, the Court hereby enters judgment in favor of Defendants, Ron Champion and Larry Fields, and against Plaintiff, Billy Gene Marshall. Plaintiff shall take nothing on his claim. Each side is to pay its respective attorney fees and costs.

SO ORDERED THIS 9th day of August, 1995.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

29

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BILLY GENE MARSHALL,

Plaintiff,

vs.

RON CHAMPION, et al.,

Defendants.

No. 94-C-866-BU

ORDER

Plaintiff, a state prisoner appearing pro se, brings this action pursuant to 42 U.S.C. § 1983, alleging that prison officials denied him a visit with his mother in violation of his constitutional rights, and that he was convicted of a misconduct without the requisite due process protection. Defendants have moved for summary judgment on the basis of the court-ordered Martinez report.[1] Plaintiff has objected. For the reasons stated below, the Court concludes that Defendants' motion should be granted.

I. BACKGROUND AND PROCEDURAL HISTORY

The following facts are undisputed.

On July 3, 1994, Plaintiff's mother, Ms. Terrie Oliver, and two other visitors arrived at the visiting room at Dick Conner Correctional Center (DCCC), Hominy, Oklahoma, during regular visiting hours, presenting themselves as approved visitors in a

[1] See Martinez v. Aaron, 570 F.2d 317 (10th Cir. 1978); Worley v. Sharp, 724 F.2d 862 (10th Cir. 1983).

28

neat and respectful manner with picture identification.[2] Prison officials denied Ms. Oliver permission to visit Plaintiff because a social security card with her picture on it was not an appropriate picture identification.[3]

After Plaintiff was notified that he could not visit with his mother, he demanded to leave the visiting area. Officer Breckenridge told him that he could not leave because of an institutional count and directed him to go to the visiting yard. When Plaintiff refused to go to the visiting yard for count, Officers Breckenridge and Davis escorted him to Shift Supervisor Lieutenant West at the Security and Operations Office where he had to wait until count was completed, from about 11:15 a.m. to 11:50 a.m. (Exs. J, R, T, U to Special Report.)

Later that day, Officer Breckenridge wrote a misconduct report charging Plaintiff with "Disobedience to Orders." On July 7, 1994, Plaintiff was found guilty of the misconduct at a disciplinary hearing and was sentenced to fifteen days of disciplinary

---

[2] Ms. Oliver and the other two visitors were on Plaintiff's approved visitor list as designated by prison officials in DCCC-090118-01. (Ex. D to Special Report.)

[3] Prison regulation DCCC-090118-01 provides in part as follows:

> Only identification, such as driver's license, or Department of Public Safety ID, which has the visitor's photo on it, is considered appropriate identification. Identification which has the visitor's name, for example, a check, social security card, or money order, will not be acceptable proof of identification. Exceptions may be made by the Shift Supervisor which shall be noted on the visiting card. An exception shall only be made once, with all future visits requiring proper identification.

(Ex. D at 4 to Special Report.)

segregation. On July 8, 1994, Plaintiff appealed the disciplinary disposition to the warden who denied relief on July 14, 1994. (Exs. J, R, V, W, X to Special Report.)

On September 12, 1994, Plaintiff filed the instant civil rights action against Ron Champion, Warden at DCCC, and Larry Fields, Director of the Oklahoma Department of Corrections.[4] He sought damages and declaratory relief.

II. SUMMARY JUDGMENT

Summary judgment pursuant to Fed. R. Civ. P. 56 is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." When reviewing a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. Applied Genetics Int'l., Inc. v. First Affiliated Sec., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990) (citing Gray v. Phillips Petroleum Co., 858 F.2d 610, 613 (10th Cir. 1988). "However, the nonmoving party may not rest on its pleadings but must set forth specific facts showing that there is a genuine issue for trial as to those dispositive matters for which it carries the burden of proof." Applied

---

[4] Although Plaintiff named the Board of Corrections and former Governor David Walters in the caption of his handwritten complaint, he neither named them properly in the form complaint nor requested that summons be issued as to these defendants. Plaintiff also failed to comply with the requirements of Fed. R. Civ. P. 23(a) for class certification.

Genetics, 912 F.2d at 1241 (citing Celotex Corp v. Catrett, 477 U.S. 317, 324 (1986)). Although the court cannot resolve material factual disputes at summary judgment based on conflicting affidavits, Hall v. Bellmon, 935 F.2d 1106, 1111 (10th Cir. 1991), the mere existence of an alleged factual dispute does not defeat an otherwise properly supported motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). Only material factual disputes preclude summary judgment; immaterial disputes are irrelevant. Hall, 935 F.2d at 1111. Similarly, affidavits must be based on personal knowledge and set forth facts that would be admissible in evidence. Id. Conclusory or self-serving affidavits are not sufficient. Id. If the evidence, viewed in the light most favorable to the non-movant, fails to show that there exists a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. See Anderson, 477 U.S. at 250.

Where a pro se plaintiff is a prisoner, a court authorized "Martinez Report" (Special Report) prepared by prison officials may be necessary to aid the court in determining possible legal bases for relief for unartfully drawn complaints. See Hall, 935 F.2d at 1109. On summary judgment, the court may treat the Martinez Report as an affidavit, but may not accept the factual findings of the report if the plaintiff has presented conflicting evidence. Id. at 1111. This process is designed to aid the court in fleshing out possible legal bases of relief from unartfully drawn pro se prisoner complaints, not to resolve material factual disputes. The plaintiff's complaint may also be treated as an affidavit if it is

sworn under penalty of perjury and states facts based on personal knowledge. Id. The court must also construe plaintiff's pro se pleadings liberally for purposes of summary judgment. Haines v. Kerner, 404 U.S. 519, 520 (1972).

III. ANALYSIS

A. Visitation

Plaintiff alleges that he has a liberty interest in visits from his mother and that he was denied the right to visit with her on July 3, 1994, without the requisite procedural due process.

To determine if Plaintiff's procedural due process rights were violated, the Court must first determine whether he had a liberty or property interest with which the State has interfered. Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 460 (1989). A protected liberty interest may arise from either the Due Process Clause itself or from state law. Id.; Hewitt v. Helms, 459 U.S. 460, 466 (1983), abrogated by Sandin v. Conner, 115 S.Ct. 2293 (1995). Although the right to reasonable visiting opportunities is of undoubted importance, the Supreme Court has declared that there is no due process right to "unfettered visitation." Thompson, 490 U.S. at 460. Therefore, the Due Process Clause does not guarantee Plaintiff an interest in visitation rights.

Plaintiff argues, however, that the DCCC's visitation policy creates a liberty interest in visitation rights.[5] The Supreme

[5] In Thompson, the state argued that liberty interests should only be created by state law in the prison context when they affect the duration of a person's prison term. Since visiting

Court recently reformulated the test for determining when state prison regulations create liberty interests. Sandin, 115 S.Ct. 2293 (1995).[6] In Sandin, the court abandoned the methodology established in Hewitt and Thompson and decided to return to the due process principles established in Wolff v. McDonnel, 418 U.S. 539 (1974) and Meachum v. Fano, 427 U.S. 215, 224-225 (1976).[7] The Sandin Court held:

> Following Wolff, we recognize[d] that States may under certain circumstances create liberty interests which are protected by the Due Process Clause. But these interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.

Sandin, 115 S.Ct. 2293, 2299 (1995) (citations omitted). The Court

---

regulations do not have that effect, defendants argued that regardless of the mandatory nature of the language in the regulation, a liberty interest could not be created. The Court refrained from considering that issue but left it open to be argued in a later case. 490 U.S. at 461 n.3.

[6] The Supreme Court's decision in Sandin applies retroactively to the instant case because the Court applied the rule announced in Sandin to the parties in that case. See Harper v. Virginia Dep't of Taxation, ___ U.S. ___, 113 S.Ct. 2510, 2517 (1993) (no court may refuse to apply rule of federal law retroactively once the Court applies it to the parties before it).

[7] Under Hewitt, in order for a state law establishing procedural guidelines for prisons to create a liberty interest, the law must use "explicitly mandatory language" that forbids certain outcomes absent "specific substantive predicates." Hewitt, 459 U.S. at 472. This approach focused on the language of the regulation rather than the nature of the deprivation and "encouraged prisoners to comb regulations in search of mandatory language on which to base entitlements to various state-conferred privileges." Sandin, 115 S.Ct. at 2299. The methodology of Hewitt has discouraged states from codifying prison management procedures and involved federal courts in the day-to-day management of prisons. Id.

is to defer to prison officials so that they may have the "flexibility [that] is especially warranted in the fine-tuning of the ordinary incidents of prison life." Id. Under Sandin, the Court should hesitate to find a liberty interest unless the "State's action will inevitably affect the duration of [the inmate's sentence]." Id. at 2302.

In Sandin, the plaintiff was involved in an altercation with a prison guard and charged with misconduct. The plaintiff appeared before an adjustment committee, which refused his request to present witnesses at the hearing. The committee found him guilty and sentenced him to 30 days disciplinary segregation. Nine months later, an administrator found one of the charges against the plaintiff unsupported and expunged his record of that charge. Id. at 2295-96. Alleging a deprivation of due process related to the disciplinary hearing, the plaintiff sued for injunctive relief, declaratory relief and damages. Id. The Ninth Circuit Court of Appeals found that plaintiff had a liberty interest in remaining free from disciplinary segregation based on a prison regulation that "instructs the committee to find guilty when a charge of misconduct is supported by substantial evidence." Id. at 2296-97.

The Supreme Court applied its new test and reversed. The Court found that segregated confinement of inmates did not implicate the Due Process Clause because it did not "present the type of atypical, significant deprivation in which a state might conceivably create a liberty interest." Id. at 2301. The Court noted that disciplinary segregation conditions were substantially

similar to those faced by inmates in administrative segregation and protective custody. Id. Therefore, plaintiff's confinement "did not exceed similar, but totally discretionary confinement in either duration or degree of restriction." Id. The Court further noted that even inmates in the general population at the prison in question are subject to significant amounts of "lockdown time." Id. Because the plaintiff's confinement for 30 days in disciplinary segregation "did not work a major disruption in his environment," the Court held that the prison regulation had not created a constitutionally protected liberty interest. Id. at 2301-02.

Under the principles set forth in Sandin, this Court finds that neither the State of Oklahoma nor the Oklahoma Department of Corrections (DOC) has created a liberty interest in visitation privileges at DCCC. The fact that prison officials denied Plaintiff the opportunity to visit with his mother due to the lack of a correct picture ID does "not present the type of atypical, significant deprivation in which a state might conceivably create a liberty interest." Id. at 2301. Because Plaintiff does not have a liberty interest in visits from his mother, he was not deprived of his visitation privileges in violation of his due process rights and Defendants are entitled to judgment as a matter of law.

B. Disciplinary Segregation

Next Plaintiff alleges he was denied due process protection during the disciplinary proceedings. He contends that he was not

given the requisite 24-hour preparation time to formulate a defense and that he was not provided the aid of a staff representative. Defendants respond that Plaintiff was charged with and convicted of "Disobedience to Orders" in accordance with the DOC's Disciplinary Procedures and Wolff v. McDonnell, 418 U.S. 539 (1974).

Under the principles set forth in Sandin, 115 S.Ct. at 2301, this Court finds that DOC's regulations do no create a liberty interest in remaining free from disciplinary segregation.[8] The deprivations allegedly suffered by Plaintiff, 15 days in disciplinary segregation, are not of the "atypical" or "significant" kind that the Supreme Court has determined constitute deprivations in which a state might create a liberty interest. See Mujahid v. Meyer, ___ F.3d ___, 1995 WL 399458 (9th Cir. July 10, 1995) (fourteen-day in disciplinary segregation as a result of a misconduct did not implicate any liberty interest pursuant to Sandin). The conditions in disciplinary segregation are not dramatically different from what prisoners expect to encounter in the general population. Since no liberty interest was implicated, the Court finds that Plaintiff was not even entitled to a hearing. See Brown v. Champion, 1995 WL 433221 (10th Cir. July 24, 1995) (unpublished opinion) (inmate was not entitled to hearing because no constitutional liberty interest was implicated either by his ten-day disciplinary segregation or by his reclassification by prison officials).

---

[8] Nor does the Due Process Clause independently protect any liberty interest in avoiding confinement in administrative segregation. Hewitt v. Helms, 459 U.S. 460, 468 (1983).

III. CONCLUSION

After viewing the evidence in the light most favorable to Plaintiff, the Court concludes that Defendants have made an initial showing negating all disputed material facts, that Plaintiff has failed to controvert Defendants' summary judgment evidence, and that Defendants are entitled to judgement as a matter of law. Accordingly, Defendants' motion for summary judgment (doc. #15) is hereby granted.

SO ORDERED THIS 9th day of August, 1995.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 9 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

PEGGY J. NEECE and BUEL H. NEECE,

Plaintiffs,

vs.

No. 88-C-1320-E

INTERNAL REVENUE SERVICE OF THE UNITED STATES OF AMERICA, THE UNITED STATES OF AMERICA, and FIRST NATIONAL BANK OF TURLEY, N.A.,

Defendants.

ENTERED ON DOCKET

DATE AUG 10 1995

J U D G M E N T

In accord with the Findings of Fact and Conclusions of Law filed this date, the Court hereby enters judgment in favor of the Defendants, Internal Revenue Service of the United States of America, and The First National Bank of Turley, and against the Plaintiffs, Peggy J. Neece and Buel H. Neece. Plaintiff shall take nothing of its claim for attorney fees from the bankruptcy, jeopardy assessment, and tax court proceedings.

Dated, this 9th day of August, 1995.

James O. Ellison

JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

271

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PEGGY J. NEECE and BUEL H. NEECE,

Plaintiffs,

vs.

INTERNAL REVENUE SERVICE OF THE UNITED STATES OF AMERICA, THE UNITED STATES OF AMERICA, and FIRST NATIONAL BANK OF TURLEY, N.A.,

Defendants.

No. 88-C-1320-E

ORDER

Plaintiffs brought this action claiming that the Defendants violated the Right to Financial Privacy Act, 12 U.S.C. §3401, et seq. (RFPA). This Court has previously found that the Defendants did violate the RFPA by the disclosure of certain of Plaintiffs' bank records by the First National Bank of Turley (Bank) to the Internal Revenue Service (IRS) on April 26, 1988 and June 20, 1988. In assessing damages for the violation of the RFPA, the Court did not award attorney's fees incurred in certain other related matters.[1] The Tenth Circuit reversed and remanded the judgment on the issue of whether Plaintiffs were entitled to the attorney fees incurred in the related proceedings as damages in this RFPA case. The issue before the Court, the parties all agree, is whether Plaintiffs' jeopardy assessment proceeding, bankruptcy, and tax

[1] The "related" proceedings, for which Plaintiff is seeking attorney fees as damages in this case are the jeopardy assessment abatement proceeding, case number 88-C-1055-E, filed in the United States District Court for the Northern District of Oklahoma; Buel Neece's Chapter 11 bankruptcy proceeding, and a proceeding filed in tax court.

270

court proceeding were proximately caused by Defendants' violation of the RFPA, so as to make attorneys fees in those actions damages in this action.

The Court, upon consideration of the evidence presented at the hearing, the briefs submitted, and arguments of counsel, enters the following findings of fact and conclusions of law:

Findings of Fact

1. The Plaintiffs have alleged that the Defendants violated the RFPA by virtue of the Bank's provision of its file to the IRS on April 26, 1988, and the Bank's provision of certain checks, bank statements, and deposit slips to the IRS on June 20, 1988. The Court, in its Findings of Fact, Conclusions of Law, Order and Judgment, Filed May 21, 1993, found that the Defendants did breach the RFPA (Defendants, in fact, admitted liability), and assessed damages for the breach. Those Findings of Fact are incorporated herein by reference.[2]

2. Bank President Mikel Hoffman testified that, previous to turning over the file, he became concerned over certain transactions that Mr. Neece was wanting to enter into. He called IRS agent Gary Benuzzi, and told him that Mr. Neece had sought information about mortgaging his homestead as additional collateral for a commercial loan with the bank, and that Mr. Neece stated that the purpose of the proposed mortgage was to enable his to take an

[2] The finding that the claim for attorney fees from related matters was barred by the doctrine of res judicata, which was reversed by the tenth circuit, is not incorporated in this Order.

interest deduction for his commercial loan under the home e-quity law. Mr. Hoffman also told agent Benuzzi that Mr. Neece had told him that the IRS was getting ready to move against Mr. Neece and therefore, he wanted to have a mortgage on his homestead.

3. Mr. Hoffman informed agent Benuzzi that Mr. Neece had told another bank employee that the loan was for the purpose of paying the Internal Revenue Service, but that the loan application stated that the loan was for debt consolidation. Mr. Hoffman requested that the agent keep his contact confidential.

4. Subsequently, agent Benuzzi visited Mr. Hoffman and requested Mr. Hoffman's file which was turned over without a subpoena. The file turned over to agent Benuzzi contained 1) a copy of the recorded mortgage on the Neece Homestead, 2) a memo by Mr. Hoffman dated November 18, 1987 to Bank personnel advising them not to put credence in the Neece homestead mortgage; 3) the residential loan application of Mr. Neece, 4) an unsigned financial statement for Mr. Neece; and 5) a letter by Mr. Hoffman of April 25, 1988 denying the loan application.

5. Agent Benuzzi then recommended a Jeopardy Assessment and certain of the Neece's assets were seized by the IRS. The IRS informed the Neeces that it was making the jeopardy assessment because: 1) Mr. Neece had recently been convicted of tax evasion for the years 1979, 1980, and 1981; 2) Mr Neece had previously converted checks to cash to conceal flow of funds, used a fictitious name and a nominee trust to conceal assets and income; 3) Mr. Neece had attempted recently to encumber valuable assets by

granting a mortgage against his home; 4) Mr. Neece had recently attempted to convert into cash real assets valued at $350,000.

6. The Neeces filed an action to abate the jeopardy assessment, and the jeopardy assessment was abated. Because of his confidential status, Mr. Hoffman did not testify at that proceeding.

7. These reasons for making the jeopardy assessment were not based on the documents produced in violation of the RFPA, but rather upon the oral information provided by Mr. Hoffman.

8. Mr. Potts, who represented the Neeces in the jeopardy assessment case, the tax court case, and Mr. Neece's criminal trial, testified that the attorneys' fees for the tax court case related to determining the Plaintiffs' tax liability for the years 1979, 1980, and 1981. He also testified that the time would have been spent even if there had been no jeopardy assessment.

9. Therefore the tax court case was a result of the money owed to the IRS by the Neeces.

10. Mr. Potts testified that the main reason for filing bankruptcy was to provide a mechanism for his law firm to get paid. He also testified that the bankruptcy would provide a mechanism for consolidating all of the actions concerning the Neeces' taxes.

11. Mr. William R. Grimm, the Neeces' present attorney on the bankruptcy case, testified that the principal creditor is the IRS, and that a substantial part of his time is spent on resolving the amount of taxes owed by the Neeces for the years 1979, 1980, and 1981.

12. Mr. Neece testified at trial that he made the tax court and bankruptcy filings on the advice of counsel, that the tax court case concerned the amount of unpaid taxes, and that one of the reasons he filed the bankruptcy was to delay the tax court case.

13. Any findings of fact that are actually conclusions of law should be considered as such.

Conclusions of Law

14. Oklahoma law regarding proximate cause applies in this case. See Beesley v. United States, 364 F.2d 194 (1966). In order for a plaintiff to recover damages from a defendant for tortious conduct, the tortious conduct must be the proximate cause of the injuries for which damages are sought. Key v. Liquid Energy Corp., 906 F.2d 500, 505 (10th Cir. 1990). "Proximate cause is defined as an event which, in the natural and continuous sequence, unbroken by any independent cause, produces an event and without which that event would not have occurred." Id.

15. The Court finds that the oral tip by Mr. Hoffman, among other things known by the IRS (i.e., Mr. Neece's conviction for tax evasion) was the cause of the jeopardy assessment. The jeopardy assessment was set aside because of the IRS's failure to fully investigate the revocable family trust. Therefore the violation of the RFPA was not the cause of either the jeopardy assessment or its abatement, and thus, was not the proximate cause of any attorney's fees incurred in the jeopardy assessment proceeding.

16. The tax court case was filed as a result of the taxes owed by the Neeces for 1979, 1980, and 1981, and the fees incurred were

spent on determining the amount of taxes owed for those years. Thus the violation of the RFPA was not the proximate cause of those fees. The testimony that the Neece's could have prevented the tax court case by settling the tax liability issue if the jeopardy assessment had not occurred is not convincing in light of their difficulties with the IRS prior to the jeopardy assessment and since that time.

17. The Bankruptcy court case was not proximately caused by the violation of the RFPA.

18. Any conclusions of law that are actually findings of fact should be considered as such.

SO ORDERED THIS 9TH DAY OF AUGUST, 1995.

JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CLARENCE R. LIST and LINDA LIST,)
)
Plaintiffs,)
)
vs.) Case No. 94-C-1039-E
)
ANCHOR PAINT MANUFACTURING)
COMPANY, WANDA FOWLER, and)
CHIP MEAD,)
)
Defendants.)

ORDER OF DISMISSAL WITH PREJUDICE

Upon Joint Motion by the parties, this Court hereby dismisses the captioned action with prejudice.

IT IS SO ORDERED.

DATED this 8 day of August, 1995.

S/ JAMES O. ELLISON
UNITED STATES DISTRICT COURT
JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. KENNETH DALE TURNER aka Kenneth Turner; DEBORAH ANN TURNER; STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION; STATE INSURANCE FUND; COUNTY TREASURER, Rogers County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma, Defendants.	)	Civil Case No. 95 C 229B

FILED
AUG - 8 1995
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

ENTERED
DATE AUG 09 1995

ORDER

Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that this action shall be dismissed without prejudice.

Dated this 8th day of August, 1995.

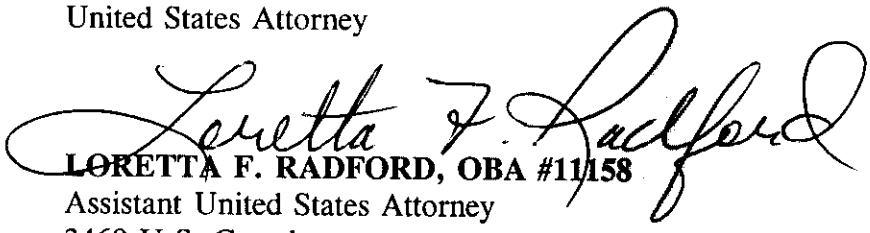
S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

NOTE: PROCESS DOCUMENTS IMMEDIATELY UPON RECEIPT.

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

LFR:flv

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LEVA EDWARD MCKINNEY,

Plaintiff,

v.

PHILLIP M. OWEN and the UNITED STATES POSTAL SERVICE,

Defendants.

Case No. 94-CV-0710-H

J U D G M E N T

This matter came before the Court on a Motion for Summary Judgment by Defendants. The Court duly considered the issues and rendered a decision in accordance with the order filed on July 14, 1995.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for the Defendants and against the Plaintiff.

IT IS SO ORDERED.

This 8TH day of August, 1995.

Sven Erik Holmes
United States District Judge

12

UNITED STATES DISTRICT COURT
IN THE NORTHERN DISTRICT OF OKLAHOMA

BASNETT ENTERPRISES, INC.,

Plaintiff,

v.

CURTIS GLENN SKELTON and/or BOMARK CONSTRUCTION CO., INC., and UNITED FIRE & CASUALTY COMPANY,

Defendants.

ENTERED ON DOCKET

DATE AUG 09 1995

Case No. 95-C-226-H

FILED

AUG 8 1995

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

O R D E R

This matter comes before the Court on a Motion to Dismiss or alternatively a Motion to Change Venue by Defendant United Fire & Casualty Company ("United Fire") and a Motion to Dismiss or alternatively a Motion to Transfer Venue by Defendant Curtis Glenn Skelton ("Skelton") and/or Bomark Construction Company, Inc. ("Bomark Construction").

Plaintiff Basnett Enterprises, Inc. ("Basnett") is an Oklahoma corporation with its principal place of business in Oklahoma. Basnett, a general contractor, built the Victorian Palace Motel located in Branson, Missouri. As a part of that project, on July 6, 1993, Plaintiff entered into a contract with Skelton and/or Bomark Construction "to erect a roof on the Victorian Palace Motel, Branson, Missouri". Plaintiff claims that Bomark Construction breached its contract causing interior damage to the Motel and the need to repair or replace the roof.

Plaintiff also entered into an insurance contract with United Fire in Branson, Missouri to provide insurance coverage for the

(8)

Motel. Plaintiff's claim against United Fire is predicated upon an alleged tortious breach of the insurance contract.

The statute governing venue in cases founded upon diversity jurisdiction provides that the action may be brought only in:

> (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which the defendants are subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.

28 U.S.C. § 1391(a).

Skelton, the only individual defendant, resides in Arkansas. A corporate defendant resides in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced. Id. § 1391(c). United Fire is an Iowa corporation with its principal place of business also in Iowa. United Fire is licensed to do business in Oklahoma. Bomark Construction is an Arkansas corporation with its principal place of business in Arkansas. Bomark Construction is not licensed to do business in Oklahoma.

It is clear that venue is not proper in the Northern District of Oklahoma pursuant to subsection one of the applicable statute because all Defendants do not reside in Oklahoma. Skelton is an Arkansas resident. The record reveals that Bomark Construction does not appear to have any contacts with Oklahoma.

Venue is also not proper in the Northern District of Oklahoma pursuant to subsection two. There are no allegations that any part

of the events or omissions giving rise to Plaintiff's claims occurred in Oklahoma.

Subsection three of the venue statute is not implicated because the Court finds that there is a judicial district where this action may be brought. That district is the Western District of Missouri.

Under 28 U.S.C. § 1406(a), because Plaintiff commenced this action in an improper venue, the Court grants Defendants' Motions (Docket # 2 and Docket # 4) to transfer the case to a proper venue, namely, the Western District of Missouri.

The Court hereby orders that Case Number 95-C-226-H be transferred to the Western District of Missouri.

IT IS SO ORDERED.

This 8TH day of AUGUST, 1995.

Sven Erik Holmes
United States District Judge

o:\holmes\orders\95cv226.ven

FILED

AUG - 7 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

BETTY L. PHILLIPS)
)
Plaintiff,)
)
v.) NO. 94-C-87-M
)
DONNA E. SHALALA,)
Secretary of HHS)
)
Defendant.)

ENTERED ON DOCKET
DATE AUG 09 1995

JUDGMENT

Judgment is hereby entered for the **Defendant** and against Plaintiff. Dated this 7th day of August, 1995.

Frank H. McCarthy
FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

10

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

BETTY L. PHILLIPS,

Plaintiff,

v.

DONNA E. SHALALA,[1] Secretary of Health and Human Services,

Defendant.

NO. 94-C-87-M

ORDER

Plaintiff, Betty L. Phillips, seeks judicial review of a decision of the Secretary of Health & Human Services denying Social Security disability benefits.[2] In accordance with 28 U.S.C. §636(c)(1) & (3) the parties have consented to proceed before a United States Magistrate Judge, any appeal of this Order will be directly to the Circuit Court of Appeals.

The role of the court in reviewing the decision of the Secretary under 42 USC § 405(g) is to determine whether there is substantial evidence in the record to support the decision of the Secretary, and not to reweigh the evidence or try the issues *de novo*. *Sisco v. U.S. Dept. of Health and Human Services*, 10 F.3d 739, 741 (10th Cir. 1993). In order to determine whether the Secretary's decision is supported by substantial evidence, the court must meticulously examine the record. However, the court may not substitute its discretion for that of the

---

[1] *Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. However, this Order continues to refer to the Secretary because she was the appropriate party at the time of the underlying decision.*

[2] *Ms. Phillips' July 2, 1991 application for disability benefits was denied September 11, 1991, the denial was affirmed on reconsideration, September 24, 1992. A hearing before an Administrative Law Judge was held January 20, 1993. By order dated September 1, 1993 the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on November 30, 1993. The decision of the Appeals Counsel represents the Secretary's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.*

Secretary. *Musgrave v. Sullivan*, 966 F.2d 1371, 1374 (10th Cir. 1992). If supported by substantial evidence, the Secretary's findings are conclusive and must be affirmed. *Richardson v. Perales,* 402 U.S. 389, 390, 91 S.Ct. 1420, 1422, 28 L.Ed.2d 842, (1971). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* at 401, 91 S.Ct. at 1427.

The record of the proceedings has been meticulously reviewed by the Court. The undersigned United States Magistrate Judge finds that the Administrative Law Judge ("ALJ") has adequately and correctly set forth the relevant facts of this case and applied the proper legal principals to these facts [R. 14-32]. The Court therefore incorporates these findings into this order as the duplication of this effort would serve no useful purpose.

Plaintiff alleges that the record does not support the determination of the Secretary by substantial evidence. Specifically, Plaintiff claims that the ALJ inappropriately disregarded the opinion of her treating physician, Dr. Irwin, who stated she is totally disabled. Plaintiff also claims that it was improper for the ALJ to have commented on her personal activities in conjunction with her ability to work.

A treating physician may offer an opinion which reflects a judgment about the nature and severity of the claimant's impairments including the claimant's symptoms, diagnosis and prognosis, and any physical and mental restrictions. See 20 C.F.R. §§ 404.1527(a)(2), 416.927(a)(2). The Secretary will give controlling weight to that type of opinion if it is well supported by clinical and laboratory diagnostic techniques and if it is not inconsistent with other substantial evidence in the record. §§ 404.1527(d)(2), 416.927(d)(2). A treating physicians'

opinion may be rejected if it is brief, conclusory and unsupported by medical evidence. Specific, legitimate reasons for rejection of the opinion must be set forth by the ALJ. *Frey v. Bowen,* 816 F.2d 508 (10th Cir. 1987).

In this case the ALJ found that the medical records of Plaintiff's physicians did not contradict the findings of the consultive physician, Dr. Dandridge, that she can perform light exertional activity[3], provided she does not engage in repetitive use of the upper right extremity [R. 19]. The only piece of information offered by a medical professional that contradicts the ALJ's findings is a letter dated November 17, 1992 from Plaintiff's physician, Dr. Peter J. Irwin [R. 289]. The entire text of the letter follows:

> To Whom It May Concern:
>
> RE: Betty Phillips
> DOB: 4-8-44
> SSN: 445-46-1377
>
> Gentlemen:
>
> Currently this patient remains under my care for the orthopaedic management of reflex sympathetic dystrophy.
>
> At this point in time she is totally disabled and unable to return to work.
>
> If any further information is necessary, feel free to contact me.

The Court agrees with the ALJ that this opinion should be disregarded. The letter is brief, conclusory and unsupported by the physician's treatment notes where he documents intermittent symptoms, benefit to treatment and that Plaintiff is able to cope and function [R. 238-245]. While a physician may proffer an opinion that a claimant is totally disabled, that opinion is not

---

[3] *Light exertional activity is that which involves lifting no more than 20 pounds at a time with frequent lifting of objects weighing up to 10 pounds. See 20 C.F.R. §404.1567(b).*

dispositive because final responsibility for determining the ultimate issue of disability is reserved to the Secretary. See 20 C.F. R. §§ 404.1527(e)(2), 416.927(e)(2); *Castellano v. Secretary of Health and Human Services*, 26 F.3d 1027, 1028 (10th Cir. 1994), *Eggleston v. Bowen*, 851 F.2d 1244, 1246-7 (10th Cir. 1988) (if treating physician's progress notes contradict his opinion, it may be rejected).

The Court finds that the ALJ properly assessed Plaintiff's activities of daily living, including her travel to Germany, household chores, and yard work in connection with her claim for disability. Such an approach is entirely appropriate. While not necessarily establishing that Plaintiff can perform work activities, such activities may be considered along with other evidence in determining whether a person is entitled to disability. *Talbort v. Heckler*, 814 F.2d 1456, 1462-3 (10th Cir 1987).

The Secretary is entitled to examine the medical record and to evaluate a claimant's credibility in determining whether the claimant suffers from disabling pain. *Brown v. Bowen*, 801 F.2d 361, 363 (10 Cir. 1986). Credibility determinations made by an ALJ are generally treated as binding upon review. *Talley v. Sullivan*, 908 F.2d 585, 587 (10th Cir. 1990). The ALJ listed the guidelines set forth in *Luna v. Bowen*, 834 F.2d 161, 165 (10th Cir. 1987), 20 C.F.R. 404.1529(c)(3), 20 C.F.R. 416.929(c)(3), and Social Security Ruling 88-13 and appropriately applied the evidence to those guidelines [R. 22]. The Court finds that the ALJ evaluated the record, Plaintiff's credibility and allegations of pain in accordance with the correct legal standards established by the Secretary and the courts.

The Court finds that there is substantial evidence in the record to support the ALJ's decision. Accordingly, the decision of the Secretary finding Plaintiff not disabled is AFFIRMED.

SO ORDERED THIS 5th day of August, 1995.

Frank H. McCarthy

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

WARREN C. CHAPPELL,

Plaintiff,

v.

SHIRLEY S. CHATER, COMMISSIONER OF SOCIAL SECURITY,[1]

Defendant.

Case No. 94-C-9-W

ORDER

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Secretary of Health and Human Services ("Secretary") denying plaintiff's application for disability insurance benefits under §§ 1602 and 1614(a)(3)(A) of the Social Security Act, as amended.

The procedural background of this matter was summarized adequately by the parties in their briefs and in the decision of the Administrative Law Judge ("ALJ"), which summaries are incorporated herein by reference.

The only issue now before the court is whether there is substantial evidence in the record to support the final decision of the Secretary that claimant is not disabled within the meaning of the Social Security Act.[2]

---

[1] Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

[2] Judicial review of the Secretary's determination is limited in scope by 42 U.S.C. § 405(g). The court's sole function is to determine whether the record as a whole contains substantial evidence to support the Secretary's decisions. The Secretary's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

In the case at bar, the ALJ made his decision at the fourth step of the sequential evaluation process.[3] He found that claimant had the residual functional capacity to perform work-related activities, except for work involving left side pain, restricted use of left hand, wearing of a wrist brace, chronic pain which is noticeable, but is kept in check by medications which do not preclude him from working, and assisting in changing positions from time to time. He concluded that claimant's past relevant work as a department store manager, housekeeping manager, or an apartment complex manager did not require the performance of work-related activities precluded by the above limitations, and thus claimant's impairments did not prevent him from performing his past relevant work. Having determined that claimant's impairments did not prevent him from performing his past relevant work, the ALJ concluded that he was not disabled under the Social Security Act at any time through the date of the decision.

Claimant now appeals this ruling and asserts alleged errors by the ALJ:

(1) The ALJ erred in not ordering a mental examination of claimant in light of the evidence that claimant suffered a mental/emotional impairment.

Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). In deciding whether the Secretary's findings are supported by substantial evidence, the court must consider the record as a whole. Hephner v. Mathews, 574 F.2d 359 (6th Cir. 1978).

[3] The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

1. Is the claimant currently working?
2. If claimant is not working, does the claimant have a severe impairment?
3. If the claimant has a severe impairment, does it meet or equal an impairment listed in Appendix 1 of the Social Security Regulations? If so, disability is automatically found.
4. Does the impairment prevent the claimant from doing past relevant work?
5. Does claimant's impairment prevent him from doing any other relevant work available in the national economy?

20 C.F.R. § 404.1520 (1983). See generally, Talbot v. Heckler, 814 F.2d 1456 (10th Cir. 1987); Tillery v. Schweiker, 713 F.2d 601 (10th Cir. 1983).

(2) The ALJ erred in relying upon vocational expert testimony instead of accepting plaintiff's own description of the specific job duties as he actually performed his past jobs, and erroneously concluded he could return to his past relevant work.

It is well settled that the claimant bears the burden of proving his disability that prevents him from engaging in any gainful work activity. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984).

Claimant injured his left hand, wrist, forearm, and shoulder when he fell on a slippery floor at work on January 16, 1991 (TR 191). He had ulnar nerve entrapment surgery on July 30, 1991 (TR 113-116). By August 13, 1991, he was doing "a little better" and had less spasms and more movement (TR 163). By August 22, 1991, he was receiving physical therapy and using a TENS unit to decrease pain (TR 157). On September 19, 1991, his doctor was "beginning to have doubts on Warren's motivation" (TR 156). On September 27, 1991, he was placed in a dynasplint elbow extension splint and found to be "somewhat non-compliant with home program of exercises, CPM, etc." (TR 153). On October 8, 1991, he was seen as "doing better" and "starting to respond to therapy" (TR 149). By November 14, 1991, he had all "but 10 to 15 degrees of full extension of the elbow." (TR 146).

Dr. James Bischoff found "no clinical evidence of neuropathy" in claimant's left arm and diffuse symptoms (TR 123). He concluded there was a 5 percent permanent partial disability to the left upper extremity (TR 123). Dr. Hans P. Norberg, his treating physician, concluded on April 14, 1992, that claimant had a 30 percent permanent partial disability of the extremity (TR 130). On June 3, 1992, Dr. Lawrence Reed concluded

claimant was disabled according to the City of Tulsa's Housing Authority's definition, which is similar to the definition of disability in the Social Security Act (TR 125-126).

Dr. Michael Tanner concluded on July 21, 1992, that claimant "embellishes his symptoms," because there was no evidence of "neck or shoulder pathology which would require further medical diagnostic measures or treatment." (TR 172). The doctor noted that claimant had taken a Minnesota Multiphasic Personality Inventory which showed "elevation of the hysteria and hypochondriacal indices." (TR 173). He also noted that "Doctors Baldwin and Bell" felt there was "no evidence of organic pathology." (TR 173). In a letter dated August 29, 1992, Dr. Reed reviewed claimant's medical history (TR 182-200). He said he could not completely extend claimant's left elbow either passively or actively, that claimant had "symptom magnification" and neurosis associated with pain, and that there was 30% impairment of the left shoulder (TR 191, 192, 196).

There is no merit to claimant' first contention that the ALJ erred in failing to order a mental examination of claimant in light of evidence that he suffered a mental/emotional impairment. The "evidence" claimant relies on is Dr. Reed's letter of August 29, 1991, in which he noted that claimant's complaints were consistently out of proportion to objective medical findings and attributed this to "mental/emotional deterioration . . ." which he assessed as being 20% of the body as a whole (TR 199).

Claimant never raised the issue of a mental/emotional illness. Also, he never sought treatment for any alleged mental impairment (TR 85-86, 98-99, 105). The brief conclusory statements of Dr. Reed were not supported by any psychological tests, and the doctor was a surgeon, not a trained psychologist or psychiatrist. The record demonstrates that

plaintiff's activities were not restricted due to a mental impairment, and he had no difficulty with activities of daily living, social functioning, or completing tasks in a timely manner. Dr. Reed's opinion does not show that plaintiff has a mental impairment which prevents him from working. See Coleman v. Chater, No. 94-2235 (10th Cir. June 23, 1995).[4]

There is also no merit to claimant's second contention that the ALJ followed an erroneous procedure in concluding claimant could do his past relevant work. He claims the ALJ should have inquired into the specific job requirements of claimant's former work. This assertion ignores the well-settled principle that a claimant may be found not disabled at the fourth step if he can perform either his actual past job or his past type of job. 20 C.F.R. § 416.920(e); Jozefowicz v. Heckler, 811 F.2d 1352, 1356 (10th Cir. 1987); Tillery, 713 F.2d at 607. Since the vocational expert testified that claimant's past jobs as a department store manager, housekeeping manager, and apartment complex manager could be performed based on the abilities and restrictions he was actually found to have by the ALJ (TR 45-46), the claim was properly denied at the fourth step in the sequential evaluation process. There was substantial evidence to support the decision.

The vocational expert was relying on the job descriptions in the Dictionary of Occupational Titles ("DOT") (TR 48), and, while the ALJ did not say he also was relying on the DOT, he clearly relied on the vocational expert's testimony concerning the issue (TR 18). While claimant may not now be able to manipulate a floor scrubber/buffer or heavy

[4]The court notes that the Tenth Circuit in Andrade v. Secretary of Health & Human Servs., 985 F.2d 1045, 1048 (10th Cir. 1993), concluded that the ALJ must evaluate a claimant's mental impairment if the record contains evidence he has a mental impairment which would prevent him from working.

cleaning equipment, as he claims he did in certain of his past jobs, he can perform the type of work required of a store, housekeeping, or apartment complex manager as described in the DOT[5] (TR 44-45) and as generally performed in the national economy.

Claimant notes that the Tenth Circuit has recently found that the ALJ has a duty to

---

[5]The DOT contains the following descriptions of the jobs which claimant contends he cannot now perform:

185.117-010 MANAGER, DEPARTMENT STORE (retail trade)

> Directs and coordinates, through subordinate managerial personnel, activities of department store selling lines of merchandise in specialized departments: Formulates pricing policies for sale of merchandise, or implements policies set forth by merchandising board. Coordinates activities of nonmerchandising departments, as purchasing, credit, accounting, and advertising with merchandising departments to obtain optimum efficiency of operations with minimum costs in order to maximize profits. Develops and implements, through subordinate managerial personnel, policies and procedures for store and departmental operations and customer personnel and community relations. Negotiates or approves contracts negotiated with suppliers of merchandise, or with other establishments providing security, maintenance, or cleaning services. Reviews operating and financial statements and departmental sales records to determine merchandising activities that require additional sales promotion, clearance sales, or other sales procedures in order to turn over merchandise and achieve profitability of store operations and merchandising objectives.

187.167-046 DIRECTOR, HOUSEKEEPING

> Directs institutional housekeeping program to ensure clean, orderly, and attractive conditions of establishment: Establishes standards and procedures for work of housekeeping staff, and plans work schedules to ensure adequate service. Inspects and evaluates physical condition of establishment, and submits to management recommendations for painting, repairs, furnishings, relocation of equipment, and reallocation of space. Periodically inventories supplies and equipment. Reads trade journals to keep informed of new and improved cleaning methods, products, supplies, and equipment. Organizes and directs departmental training programs, resolves personnel problems, hires new employees, and evaluates employees performance and working relationship. Maintains records and prepares periodic activity and personnel reports for review by management. Coordinates activities with those of other departments. May select and purchase new furnishings. May evaluate records to forecast department personnel requirements, and to prepare budget. May perform cleaning duties in cases of emergency or staff shortage.

186.167-018 MANAGER, APARTMENT HOUSE (real estate)

> Manages apartment house complex or development for owners or property management firm: Shows prospective tenants apartments and explains occupancy terms. Informs prospective tenants of availability of nearby schools, shopping malls, recreational facilities, and public transportation. Rents or leases apartments, collects security deposit as required, and completes lease form outlining conditions and terms of occupancy when required. Collects rents due and issues receipts. Investigates tenant complaints concerning malfunctions of utilities or furnished household appliances or goods, and inspects vacated apartments to determine need for repairs or maintenance. Directs and coordinates activities of maintenance staff engaged in repairing plumbing or electrical malfunctions, painting apartments or buildings, and performing landscaping or gardening work, or arranges for outside personnel to perform repairs. Resolves tenant complaints concerning other tenants or visitors. May arrange for other services, such as trash collection, extermination, or carpet cleaning. May clean public areas of building and make minor repairs to equipment or appliances.

fully investigate the specific demands of a claimant's past relevant work in order to have enough facts to make such a comparison with his limitations. Henrie v. U.S. Dept. of Health & Human Services, 13 F.3d 359 (10th Cir. 1993). However, in that case there was no testimony by a vocational expert, and the court noted that it is not the ALJ's duty to be a claimant's advocate at step four of the sequential evaluation. Id. at 361. Here the ALJ followed the ruling in Henrie, id: (1) he made findings of claimant's residual functional capacity (TR 17-18), (2) he asked the vocational expert to assess the physical and mental demands of claimant's prior jobs (TR 44-45), and (3) he found that claimant had the ability to return to certain of his past relevant jobs given his residual functional capacity (TR 17-18).

The decision of the ALJ is supported by substantial evidence and is a correct application of the regulations. The decision is affirmed.

Dated this 4th day of August, 1995.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:chappell.or

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PAUL E. CASTOR,

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner
Social Security Administration,

Defendant.

Civil Action No. 94-C-753-W

ORDER

On February 13, 1995, this Court filed an Order remanding this case to the Secretary for further administrative action. The Judgment was filed June 1, 1995, in accordance with the Order of February 13, 1995. No appeal was taken from this Judgment and the same is now final.

Pursuant to plaintiff's application for attorney's fees under the EAJA, 28 U.S.C. § 2412(d), filed on or around July 20, 1995, the parties have stipulated that an award in the amount of $1,418.40 for attorney fees and expenses for all work done before the district court is appropriate.

WHEREFORE, IT IS ORDERED that plaintiff's counsel be awarded attorney's fees and expenses under the Equal Access To Justice Act in the amount of $1,418.40. If attorney fees are also awarded under 42 U.S.C. § 406(b)(1) of the Social Security Act, plaintiff's counsel shall refund the smaller award to plaintiff pursuant to Weakley v. Bowen, 803 F.2d 575, 580 (10th Cir. 1986). This action is hereby dismissed.

It is so ORDERED THIS 4 day of August 1995.

UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MARY T. JACKSON;
SHERRIE K. JACKSON;
STATE OF OKLAHOMA ex rel. Oklahoma Tax Commission;
COUNTY TREASURER, Osage County, Oklahoma;
BOARD OF COUNTY COMMISSIONERS, Osage County, Oklahoma,

Defendants.

CIVIL ACTION NO. 94-C-69-E

ORDER

Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that the Clerk's Entry of Default filed on 26th day of April, 1994 is vacated, the Judgment of Foreclosure filed on the 23rd day of May, 1994 is vacated and this action shall be dismissed without prejudice.

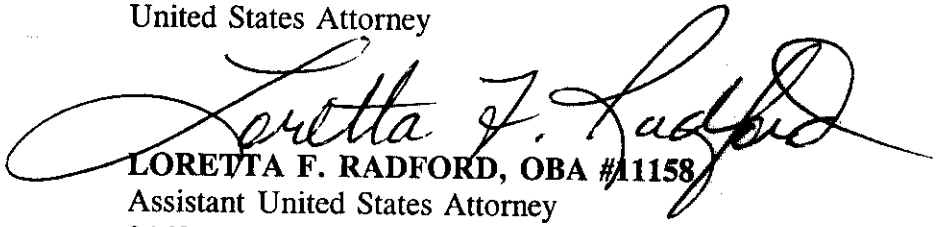
Dated this 8 day of Aug, 1995.

S/ JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

NOTE: THIS ORDER IS TO BE MAILED BY MOVANT TO ALL COUNSEL AND PRO SE LITIGANTS IMMEDIATELY UPON RECEIPT.

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

LFR:flv

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LIBERTY MUTUAL INSURANCE GROUP,

Plaintiff,

vs.

EAST CENTRAL OKLAHOMA ELECTRIC COOPERATIVE, and STONEWALL SURPLUS LINES INSURANCE COMPANY,

Defendants.

No. 93-C-1007-K

O R D E R

The Court has for consideration the motion for new trial (#27) of defendant East Central Oklahoma Electric Cooperative ("EC"). By Order entered March 29, 1995, the Court granted plaintiff's motion for summary judgment and denied defendant's motion for summary judgment in this declaratory judgment action.

To briefly reiterate the facts, three employees of Creek County Well Service ("CCWS") were injured in 1986 by contact with electrical lines owned and operated by EC. The employees brought a personal injury action against EC in state court and received a judgment. EC then pursued an indemnity action against CCWS, which resulted in a determination that CCWS was liable for 75% of the personal injury judgment previously rendered against EC. Plaintiff Liberty Mutual Insurance Group ("Liberty") is the insurer of CCWS. Liberty has paid its policy limits under the Workers' Compensation and Employers Liability Policy. EC contends it is also entitled to the liability limits of two additional Liberty policies, a

29

Comprehensive General Liability Policy and a Business Automobile Policy, both of which are issued to CCWS.

In its previous Order, the Court ruled the other two policies did not provide coverage for the claims in question. EC asks the Court to reconsider its decision. First, EC argues the Court did not take proper account of its claim under Part II of the Broad Form Comprehensive General Liability Endorsement, titled "Personal Injury and Advertising Injury Liability Coverage." The Endorsement provides coverage for "personal injury" and the following pertinent definitions are supplied:

> "Personal injury" means injury arising out of one or more of the following offenses committed during the policy period:
>
> ***
>
> (2) Wrongful entry or eviction or other invasion of the right of private occupancy;

EC claims as a "personal injury" the invasion of EC's legal right of private occupancy to maintain its electrical system without third-party interference. (Defendant's Motion for New Trial and Brief at 2). EC has not presented the Court with, nor has the Court found, any case authority finding a valid claim under similar facts. The scope of coverage for interferences with the right of private occupancy is typically limited to violations of an interest in real property. See Red Ball Leasing, Inc. v. Hartford Accident & Indemnity Co., 915 F.2d 306, 312 (7th Cir.1990). See also County of Columbia v. Continental Ins. Co., 595 N.Y.S.2d 988, 991 (N.Y.1993) ("'[W]rongful entry' and 'eviction' both. . .

involve actual interference with possessory rights to real property. Based upon the foregoing, we conclude that the coverage under the personal injury liability endorsement is limited to liability for purposeful acts aimed at dispossession of real property by someone asserting an interest therein.") The accidental contact with the high voltage lines by CCWS employees does not fall within the policy terms.

Next, the defendant contends the Court erred in ruling coverage did not exist under the Automobile Liability Policy. The Court held the same exclusionary clause which barred coverage in the Comprehensive General Liability Policy had the same effect under the Automobile Policy. The defendant insists the Court should have addressed its argument that the mobile drilling rig was an insured auto and therefore covered by the policy. The policy provides in pertinent part:

> D. "Auto" means a land motor vehicle, trailer or semitrailer designed for travel on public roads but does not include mobile equipment.
>
> ***
>
> H. "Mobile equipment" means any of the following types of land vehicles:
>
> 1. Specialized equipment such as: Bulldozers; Power shovels; Rollers, graders or scrapers; Farm machinery; Cranes; Street sweepers or other cleaners; Diggers; Forklifts; Pumps; Generators; Air compressors; Drills; Other similar equipment.
>
> 2. Vehicles designed for use principally off public roads.
>
> 3. Vehicles maintained solely to provide mobility for such specialized equipment when permanently attached.

In examining the photographs of the unit submitted as exhibits and the factual representations of the parties contained in their briefs, the Court concludes the mobile drilling rig constitutes "mobile equipment" under paragraphs H(1), (2) and (3) above. The rig consisted of a truck chassis with rig equipment permanently attached. It had specialized controls, jacks and brakes, as well as specialized power sources to lift the boom or mast. The rig was only driven on public roads briefly in order to move from one oil well servicing job to another. Its use clearly falls within paragraphs 1 and 2. As for paragraph 3, the plaintiff admitted in response to a Request for Admission that the rig was sometimes "used" for purposes other than to solely provide mobility for such equipment. (Exhibit M to Defendant's Brief in Support of Motion for Summary Judgment at no.8). However, the definition in paragraph H(3) refers to the purpose for which a vehicle is "maintained", which is not synonymous with "use." Defendant has presented no evidence demonstrating the rig was not "maintained" solely to provide mobility for such specialized equipment. See also Doty v. Safeco Ins. Co., 400 So.2d 718 (La. Ct. App.1981) (a pick-up truck which had a welding rig permanently attached was "mobile equipment" under the policy.) In sum, the Court is not persuaded its previous Order was erroneous.

It is the Order of the Court that the Motion for New Trial of Defendant East Central Oklahoma Electric Cooperative is hereby DENIED.

ORDERED this 8 day of August, 1995.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DELBERT HOWARD; LORETTA HOWARD; MICHAEL DAVIS; KARLA DAVIS; SIMMONS FIRST NATIONAL BANK of Pine Bluff; CITY OF BROKEN ARROW, Oklahoma; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

Civil Case No. 95-C 580K

ORDER

Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that the Defendant, **Simmons First National Bank**, is dismissed from this action.

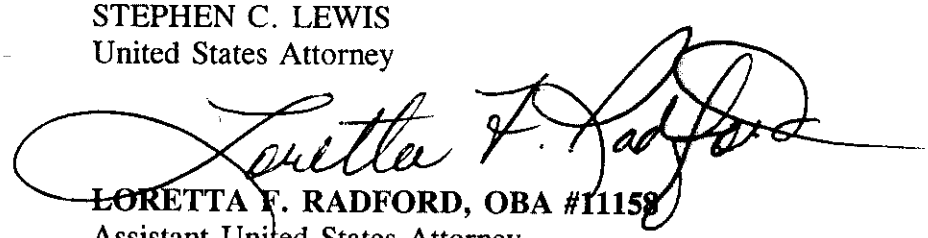
Dated this 7 day of Aug, 1995.

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

LFR:flv

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

D. LEANN LEON,)
)
Plaintiff,)
)
vs.) Case No. 94-C-895-K
)
LONG-TERM CARE AUTHORITY,)
)
Defendant.)

DISMISSAL WITH PREJUDICE

COME NOW the parties and stipulate to the dismissal of the above-styled and numbered cause with prejudice to any future action.

Respectfully submitted,

FRASIER & FRASIER

By: _____

Steven R. Hickman OBA#4172
1700 Southwest Boulevard
P.O. Box 799
Tulsa, OK 74101
(918) 584-4724
Attorneys for Plaintiff

CONNERS & WINTERS

By: _____

Deirdre O. Dexter OBA#10780
P. Scott Hathaway OBA#13695
2400 First National Tower
Tulsa, OK 74103
(918) 586-5711
Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PUBLIC SERVICE COMPANY OF OKLAHOMA, an Oklahoma corporation,

Plaintiff,

vs.

A right-of-way fifty (50) feet in width, et al.,

Defendants.

No. 93-C-855-K

JUDGMENT

This is a civil action brought by Plaintiff Public Service Company of Oklahoma ("PSO") under the power of eminent domain against the United States of America, Trustee and Owner of the legal title to certain land for use and benefit of Elliott Bim Bruner, a restricted Creek Indian.

At the time of the Order issued on July 11, 1995, the only issue that remained in this dispute was whether the term of the easement granted to Plaintiff should be limited or perpetual.

This issue came before the Court for consideration of the Plaintiff's Brief in Support of Perpetual Easement. The issues having been duly considered and a decision having been rendered in accordance with the Order filed on July 11, 1995,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the Plaintiff and against the Defendant.

ORDERED this 7 day of August, 1995.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, v. ONE PARCEL OF REAL PROPERTY KNOWN AS 720 EAST 39TH STREET NORTH, TULSA, OKLAHOMA, AND ALL BUILDINGS, APPURTENANCES, AND IMPROVEMENTS THEREON, Defendant.	CIVIL ACTION NO. 94-C-114-K

JUDGMENT OF FORFEITURE

This cause having come before this Court upon the Stipulation for Compromise and Settlement and for Forfeiture entered into by and between the plaintiff, United States of America, and the claimant, Sylvester V. Verners, for the forfeiture of the sum of Three Thousand Five Hundred Dollars ($3,500.00), in lieu of the defendant real property, to-wit:

> One Parcel of Real Property Known As: Lot Eleven (11), Block Twelve (12), CHANDLER-FRATES FIFTH ADDITION to the City of Tulsa, Tulsa County, State of Oklahoma, according to the Recorded Plat thereof.

Claimant Sylvester V. Verners has entered into a Stipulation for Compromise and Settlement and for Forfeiture in this action, wherein Sylvester V. Verners agrees, without any admission as to liability or to the claims of the plaintiff, to the payment of the sum of Three Thousand Five Hundred Dollars

($3,500.00) for forfeiture to the United States of America in lieu of the defendant real property, pursuant to 19 U.S.C. § 1613.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED by the Court that judgment of forfeiture be entered against the sum of Three Thousand Five Hundred Dollars ($3,500.00) paid by Sylvester V. Verners, in lieu of the defendant real property, and that such sum be, and it is, forfeited to the United States of America for disposition according to law.

IT IS FURTHER ORDERED by the Court that the defendant real property be, and it is, hereby dismissed from this forfeiture action, with prejudice and without costs, and that within a reasonable time after the entry of this judgment the plaintiff will file a Release of Lis Pendens with the County Clerk of Tulsa County, Oklahoma, as to the defendant real property.

s/ TERRY C. KERN

TERRY C. KERN, Judge of the
United States District Court

SUBMITTED BY:

CATHERINE DEPEW HART
Assistant United States Attorney

N:\UDD\CHOOK\FC\VERNERS\04687

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RONALD G. TRACY aka RONALD GLENN TRACY; UNKNOWN SPOUSE, IF ANY, OF RONALD G. TRACY aka RONALD GLENN TRACY; CYNTHIA L. TRACY aka CYNTHIA LEA TRACY; UNKNOWN SPOUSE, IF ANY, OF CYNTHIA L. TRACY aka CYNTHIA LEA TRACY; STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

Civil Case No. 95-C 351K

ORDER

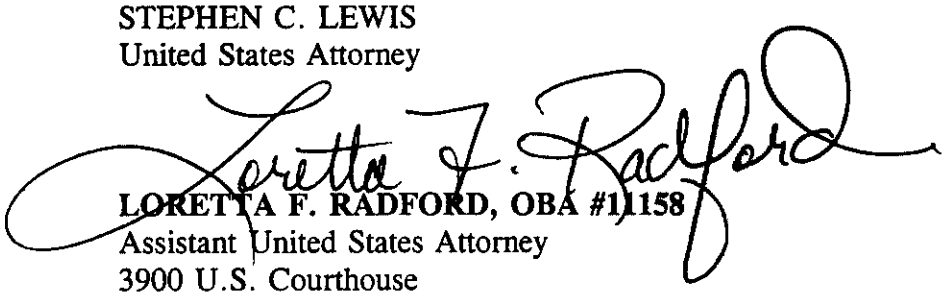
Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown it is hereby ORDERED that the Defendants, UNKNOWN SPOUSE IF ANY OF RONALD G. TRACY aka RONALD GLENN TRACY and UNKNOWN SPOUSE IF ANY OF CYNTHIA L. TRACY aka CYNTHIA LEA TRACY, are dismissed from this action.

Dated this 7 day of Aug, 1995.

s/ TERRY C. KERN
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

LFR:lg

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARYLAND SHARP,

Plaintiff,

vs.

J.C. PENNEY STYLING SALON,

Defendant.

Case No. 94-C-899K

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, the parties hereby stipulate to a Dismissal With Prejudice of Plaintiff's causes of action in this case against Defendant, J. C. Penney Company.

DATED this 20th day of July, 1995.

Maryland Sharp, an individual,
Plaintiff

Jeff Nix
2121 South Columbia
Suite 710
Tulsa, OK 74114-3521

Attorney for Plaintiff
Maryland Sharp

DOERNER, SAUNDERS, DANIEL & ANDERSON

By:

Kathy R. Neal, OBA No. 674
320 South Boston, Suite 500
Tulsa, Oklahoma 74103
(918) 582-1211

Attorneys for Defendant,
J.C. Penney Company, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

KLENDA, GORDON & GETCHELL, P.C.)
)
Movant,)
)
vs.) No. 95-M-24-H
)
UNITED STATES SECURITIES AND)
EXCHANGE COMMISSION,)
)
Respondent.)

ORDER

This matter comes before the Court on a motion by Klenda, Gordon & Getchell, P.C. (Movant) for an order to quash a subpoena served by the Securities and Exchange Commission.

Movant's request is made pursuant to Section 1110 of the Right to Financial Privacy Act of 1978, 12 U.S.C. § 3410 et seq. (the "Act"). Respondent issued a subpoena duces tecum to the Bank of Oklahoma for Movant's financial records. Under the Act, customers of financial institutions can challenge a government subpoena for financial records. Once the customer has challenged the government, the burden is on the government to reasonably describe the requested records, to establish that there is reason to believe that the requested records are relevant to a legitimate law enforcement enquiry, and to give the customer adequate notice. 12 U.S.C. § 3405; Dawar v. U.S. Department of Housing and Urban Development, 820 F.Supp. 545 (Kan. 1993).

In the instant action, the Court finds that the Securities and Exchange Commission has met its burden. The law enforcement inquiry at issue is legitimate, and Respondent has shown that the records sought are relevant to its inquiry. A copy of the subpoena

4

was sent to Movant on May 17, 1995. "Upon finding that there is a demonstrable reason to believe that the agency is conducting a legitimate law enforcement inquiry and that the records sought are relevant to that inquiry, the court 'shall deny the motion to quash.'" Sandsend Financial Consultants, Ltd. v. Federal Home Loan Bank Board, 878 F.2d 875, 877 (5th Cir. 1989), quoting 12 U.S.C. 3410(c) (emphasis in original). Therefore, the motion of Klenda, Gordon & Getchell, P.C. (docket #1) is hereby denied.

IT IS SO ORDERED.

This 8TH day of AUGUST, 1995.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JAMES ELLA MORGAN,

Plaintiff,

vs.

PHYSICIANS MUTUAL INSURANCE COMPANY, a Nebraska Corp.

Defendants.

Case No. CIV ~~94~~-95-556K

NOTICE OF DISMISSAL WITH PREJUDICE

COMES NOW, the Plaintiff, James Ella Morgan, by and through her attorneys of record, David Garrett Law Office, P.C., and in accordance with Fed.R.CIV.P., Rule 41(a)(1)(i), and hereby dismisses with prejudice the above-styled case in its entirety.

Respectfully submitted this 4 day of August, 1995.

DAVID GARRETT LAW OFFICE, P.C.

David M. Garrett, OBA #3255
Mitchell A. Lee, OBA #5357
Tami D. Mickelson, OBA #13400
Timothy R. Haney, OBA #16234
10th Floor/Severs Bldg.
215 State Street
Muskogee, Oklahoma 74401
(918) 683-3288
Attorneys for Plaintiff

CERTIFICATE OF MAILING

I hereby certify that on this 4 day of August, 1995, a true and correct copy of the above and foregoing instrument was sent by U.S. Mail, with proper postage fully prepaid thereon to:

Dave Christiansen
Physicians Mutual Insurance Company
2600 Dodge Street
Omaha, Nebraska 68131

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CLARENCE R. LIST and LINDA LIST,

Plaintiffs,

vs.

ANCHOR PAINT MANUFACTURING COMPANY, WANDA FOWLER, and CHIP MEAD,

Defendants.

Case No. 94-C-1039-E

STIPULATION FOR DISMISSAL WITH PREJUDICE

The parties have settled the captioned matter and hereby request that this Court enter the attached Order of Dismissal With Prejudice.

Respectfully submitted,

Mary L. Lohrke, OBA #15806
Boone, Smith, Davis, Hurst & Dickman
500 ONEOK Plaza
100 West Fifth Street
Tulsa, Oklahoma 74103
(918) 587-0000

Attorney for Plaintiffs

J. Patrick Cremin
Hall, Estill, Hardwick, Gable,
Golden & Nelson
320 South Boston
Tulsa, Oklahoma 74103

Attorney for Defendants

43

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
AUG - 4 1995
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

TOBIN DON LEMMONS,

Plaintiff,

vs.

LAW FIRM OF MORRIS AND MORRIS, and DANISE GRAHAM,

Defendants.

No. 93-C-1094-B

ENTERED
DATE AUG 07 1995

JUDGMENT

In accord with the Order granting Danise Graham's motion for summary judgment, the Court hereby enters judgment in favor of Defendant Danise Graham and against Plaintiff Tobin Don Lemmons. Plaintiff shall take nothing on his claim. Each side is to pay its respective costs and attorney fees.

SO ORDERED THIS 3rd day of August, 1995.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

10

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TOBIN DON LEMMONS,

Plaintiff,

vs.

LAW FIRM OF MORRIS and MORRIS, and DANISE GRAHAM,

Defendants.

No. 93-C-1094-B

ORDER

This matter comes before the Court on Defendant Danise Graham's motion for summary judgment (docket #7). Plaintiff, a pro se inmate, has objected (docket #8).[1]

On December 8, 1993, Plaintiff brought this civil rights action, alleging that Ms. Graham, in her personal and official capacities as assistant district attorney for Tulsa County, wrongfully intervened to forestall the execution of a January 15 and an April 29, 1991 Writ of Habeas Corpus Ad Testificandum which would have permitted Plaintiff to testify at a worker's compensation hearing. Plaintiff seeks monetary damages and a trial in his worker's compensation case at the earliest convenience.

Because there is no federal statute of limitations for a civil rights action, the time in which such action must be filed is determined by the applicable state statute of limitations for personal injury actions. Wilson v. Garcia, 471 U.S. 261, 266-67 (1985). The applicable statute of limitations under Oklahoma law

[1]The Court previously dismissed Plaintiff's claims against the law firm of Morris and Morris as frivolous under 28 U.S.C. § 1915(d).

is the two-year limitations period for "an action for injury to the rights of another." Meade v. Grubbs, 841 F.2d 1512, 1523 (10th Cir. 1988).

Plaintiff has cited no authority that even arguably supports his position the statute of limitations should be tolled. Nor does Plaintiff's inmate status provide sufficient justification for tolling the statute of limitations. Hudson v. McCormick, 1994 WL 237520, *1 (10th Cir. June 3, 1994) (unpublished opinion). See also Hardin v. Straub, 490 U.S. 536, 540 n.8 (1989) (Oklahoma has no tolling provision for civil lawsuits filed by prisoners). Therefore, the Court must hold that Plaintiff's claims against Ms. Graham are barred by the two year statute of limitations.

Accordingly, Defendant Graham's motion for summary judgment (docket 7) is hereby granted.

SO ORDERED THIS 3rd day of Aug., 1995.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ALBERT L. MITCHELL aka ALBERT MITCHELL; UNKNOWN HEIRS, ADMINISTRATORS, DEVISEES, TRUSTEES, SUCCESSORS and ASSIGNS of DOROTHY MITCHELL, DECEASED; JERRY M. MELONE; OSTEOPATHIC HOSPITAL FOUNDERS ASSOCIATION, a corporation doing business as TULSA REGIONAL MEDICAL CENTER, formerly OKLAHOMA OSTEOPATHIC HOSPITAL; STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

CIVIL ACTION NO. 94-C 709B

FILED

AUG [illegible] 1995

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
DATE NOV 07 1995

ORDER

Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that this action shall be dismissed without prejudice.

Dated this 3 day of August, 1995.

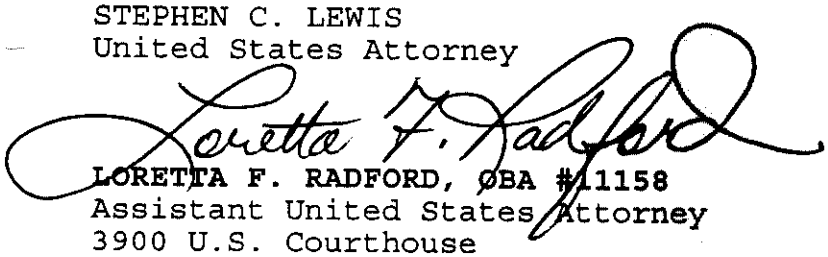
S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

NOTE: THIS ORDER IS TO BE MAILED BY MOVANT TO ALL COUNSEL AND PRO SE LITIGANTS IMMEDIATELY UPON RECEIPT.

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

LFR:lg

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
ANTONIO YARBROUGH; VIRGIE MAE YARBROUGH; STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,	)	
Defendants.	)	Civil Case No. 95-C 312B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 3 day of Aug, 1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, **County Treasurer, Tulsa County, Oklahoma**, and **Board of County Commissioners, Tulsa County, Oklahoma**, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the **Defendant, State of Oklahoma ex rel Oklahoma Tax Commission**, appears by Kim D. Ashley, Assistant General Counsel; and the Defendants, **Antonio Yarbrough and Virgie Mae Yarbrough**, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendants, **Antonio Yarbrough and Virgie Mae Yarbrough**, were each served with process on June 6, 1995; that the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, acknowledged receipt of Summons and Complaint via Certified Mail on April 6, 1995.

The Court further finds that the Defendants, Antonio Yarbrough and Virgie Mae Yarbrough are husband and wife.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma,** and **Board of County Commissioners, Tulsa County, Oklahoma,** filed their Answer on April 20, 1995; that the Defendant, **State of Oklahoma** ex rel **Oklahoma Tax Commission,** filed its Answer on May 1, 1995; and that the Defendants, **Antonio Yarbrough and Virgie Mae Yarbrough,** have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

**Lots One (1) and Two(2), WILLIAM PENN ADDITION,
an Addition in Tulsa County, State of Oklahoma,
according to the recorded Plat thereof.**

The Court further finds that on April 2, 1987, the Defendants, Antonio Yarbrough and Virgie Mae Yarbrough, executed and delivered to Mercury Mortgage Co., Inc. their mortgage note in the amount of $56,882.00, payable in monthly installments, with interest thereon at the rate of nine percent (9%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Antonio Yarbrough and Virgie Mae Yarbrough, husband and wife, executed and delivered to Mercury Mortgage Co. a mortgage dated April 2, 1987, covering the above-described property. Said mortgage was recorded on April 7, 1987, in Book 5013, Page 2169, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 27, 1989, MERCURY MORTGAGE CO., INC. assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development, Washington, D.C., his/her successors and assigns. This Assignment of Mortgage was recorded on July 28, 1989, in Book 5197, Page 1587, in the records of Tulsa County, Oklahoma. This Assignment was corrected and re-recorded, which Assignment was dated October 10, 1989 and recorded on October 11, 1989, in Book 5213, Page 150 in the records of Tulsa County, Oklahoma.

The Court further finds that on July 21, 1989 the Defendants, Antonio Yarbrough and Virgie Mae Yarbrough, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on August 6, 1990, August 5, 1991, and August 5, 1992.

The Court further finds that on September 13, 1990, the Defendants, Antonio Yarbrough and Virgie Mae Yarbrough, filed their Chapter 7 petition in the United States Bankruptcy Court for the Northern District of Oklahoma, case number 90-2667-W, which was discharged on January 11, 1991 and was subsequently closed on July 25, 1991.

The Court further finds that the Defendants, Antonio Yarbrough and Virgie Mae Yarbrough, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, **Antonio Yarbrough and Virgie Mae Yarbrough**, are indebted to the Plaintiff in the principal sum of $72,966.57, plus interest at the rate of 9 percent per annum from August 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid,

and the costs of this action in the amount of $8.40 fees for service of Summons and Complaint.

The Court further finds that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $9.00 which became a lien on the property as of July 7, 1988; a lien in the amount of $7.00 which became a lien as of July 5, 1989; a lien in the amount of $6.00 which became a lien as of July 2, 1990; a lien in the amount of $28.00 which became a lien as of June 26, 1992; a lien in the amount of $20.00 which became a lien as of June 25, 1993; and a lien in the amount of $21.00 which became a lien as of June 23, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission,** has a lien on the property which is the subject matter of this action by virtue of a tax warrant in the amount of $104.61, plus interest, penalties, and costs, which became a lien as of June 7, 1988; and a lien in the amount of $800.94, plus interest, penalties, and costs, which became a lien as of December 26, 1989. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **Board of County Commissioners, Tulsa County, Oklahoma,** claim no right, title or interest in the subject real property

The Court further finds that the Defendants, **Antonio Yarbrough and Virgie Mae Yarbrough**, are in default, and have no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendants, **Antonio Yarbrough and Virgie Mae Yarbrough,** in the principal sum of $72,966.57, plus interest at the rate of 9 percent per annum from August 1, 1994 until judgment, plus interest thereafter at the current legal rate of 5.70% percent per annum until paid, plus the costs of this action in the amount of $8.40 fees for service of Summons and Complaint, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, have and recover judgment in the amount of $91.00 for personal property taxes for the years, 1987-1989 and 1991-1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, have and recover judgment in rem in the amount of $905.55, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **Antonio Yarbrough, Virgie Mae Yarbrough and Board of County Commissioners, Tulsa County, Oklahoma,** have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, **Antonio Yarbrough and Virgie Mae Yarbrough**, to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, State of Oklahoma ex rel Oklahoma Tax Commission in the amount of $104.61, plus accrued and accruing interest for state taxes which are currently due and owing.

Fourth:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of $16.00, personal property taxes which are currently due and owing.

Fifth:

In payment of Defendant, State of Oklahoma ex rel Oklahoma Tax Commission, in the amount of $800.94 plus accrued and accruing interest for state taxes which are currently due and owing.

Sixth:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of $75.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

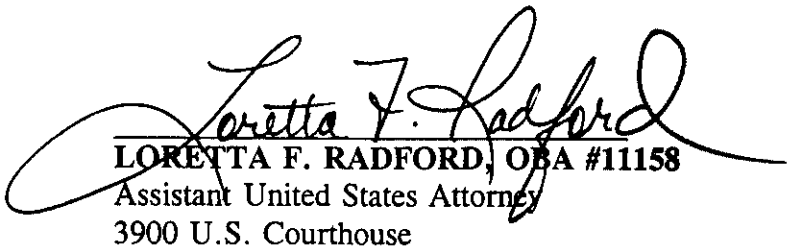
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

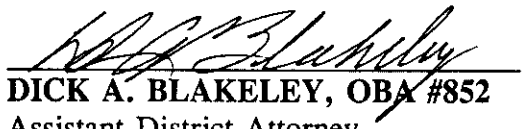
S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:
STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



DICK A. BLAKELEY, OBA #852
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4841
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

KIM D. ASHLEY, OBA #14175
Assistant General Counsel
P.O. Box 53248
Oklahoma City, Oklahoma 73152-3248
(405) 521-3141
Attorney for Defendant,
State of Oklahoma ex rel
Oklahoma Tax Commission

Judgment of Foreclosure
Civil Action No. 95-C 312B

LFR:lg

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 04 1995

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

BEVERLY FRONKO, Plaintiff, v. DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES, Defendant.	93-C-1047-W

ENTERED ON DOCKET
DATE AUG 07 1995

JUDGMENT

Judgment is entered in favor of the Secretary of Health and Human Services in accordance with this court's Order filed August 4, 1995.

Dated this 4th day of August, 1995.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

14

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 04 1995

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

BEVERLY FRONKO,

Plaintiff,

v.

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES,

Defendant.

Case No: 93-C-1047-W

ENTERED ON DOCKET
DATE AUG 07 1995

ORDER

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Secretary of Health and Human Services ("Secretary") denying plaintiff's application for disability insurance benefits under §§ 216(i) and 223 and supplemental security income under §§ 1602 and 1614 (a)(3)(A) of the Social Security Act, as amended.

The procedural background of this matter was summarized adequately by the parties in their briefs and in the decision of the Administrative Law Judge, which summaries are incorporated herein by reference.

The only issue now before the court is whether there is substantial evidence in the record to support the final decision of the Secretary that plaintiff is not disabled within the meaning of the Social Security Act.[1]

[1]Judicial review of the Secretary's determination is limited in scope by 42 U.S.C. § 405(g). The court's sole function is to determine whether the record as a whole contains substantial evidence to support the Secretary's decisions. The Secretary's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). In deciding whether the Secretary's findings are supported by substantial evidence, the court must consider the record as a whole. Hephner v. Mathews, 574 F.2d 359 (6th Cir. 1978).

13

In the case at bar, the ALJ made his decision at the fourth step of the sequential evaluation process.[2] He found that the plaintiff had the residual functional capacity to perform work-related activities, except for work involving the ability to lift more than twenty pounds at a time, lift/carry more than ten pounds frequently, stand/walk more than six hours in an eight-hour day, and do more than occasional stooping. He concluded that her past relevant work as clerical cashier, as that position was performed by her, was precluded by these limitations, but, as that work is performed within the national economy, it was not precluded by the limitations. Having determined that the plaintiff's impairments did not prevent her from performing her past relevant work, as that work is performed in the national economy, the ALJ concluded that she was not disabled under the Social Security Act at any time through the date of the decision.

Plaintiff now appeals this ruling and asserts alleged errors by the ALJ:

1. That the ALJ's decision that the plaintiff is not disabled is not supported by substantial evidence.

2. That the ALJ erred in applying the factors for disabling pain as set forth in Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987).

3. That the ALJ's finding that the plaintiff can return to her past relevant work is flawed as a matter of law and not supported by substantial evidence.

---

[2]The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

1. Is the claimant currently working?
2. If claimant is not working, does the claimant have a severe impairment?
3. If the claimant has a severe impairment, does it meet or equal an impairment listed in Appendix 1 of the Social Security Regulations? If so, disability is automatically found.
4. Does the impairment prevent the claimant from doing past relevant work?
5. Does claimant's impairment prevent him from doing any other relevant work available in the national economy?

20 C.F.R. § 404.1520 (1983). See generally, Talbot v. Heckler, 814 F.2d 1456 (10th Cir. 1987); Tillery v. Schweiker, 713 F.2d 601 (10th Cir. 1983).

It is well settled that the plaintiff bears the burden of proving her disability that prevents her from engaging in gainful work activity. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984).

The plaintiff presents a limited medical history consisting of generalized complaints of joint pain (TR 45). She has stated that the onset of her symptoms occurred in 1986, apparently without any precipitating event (TR 134). Since 1986, the pain has worsened and spread (TR 134), resulting in constant pain in her neck, shoulders, elbows, hands, and feet (TR 45, 134). While the plaintiff was originally diagnosed as having rheumatoid arthritis, her last treating physician, Dr. Ellen I. Zanetakis, has diagnosed her as having osteoarthritis (TR 50, 116). Dr. Zanetakis in her report to the Secretary stated that the plaintiff "has had some problems with bursitis" (TR 116). Plaintiff has treated her pain with Naprosyn (TR 49, 50, 116), Advil (TR 46), and fifteen minute sessions in her neighbor's hot tub, four times a day (TR 50).

Dr. Zanetakis last saw the plaintiff on a yearly follow-up visit in July of 1991 (TR 116). The doctor reported that the plaintiff was "having no problems or side effects from medication and the joints are actually doing fairly well. The only joints that her (sic) bother her very much are the knees and they are stable" (TR 116). Dr. Zanetakis found both knees to be "slightly tender, but not warm," all other joints were found to be "cool and nontender" (TR 116). Plaintiff's prescription for Naprosyn was renewed and a follow-up visit was scheduled for one year later (TR 116).

The plaintiff was also treated by Dr. Jerry Crain (TR 129). The ALJ adequately summarized the plaintiff's treatment history with Dr. Crain as follows:

> Dr. Crain's notes are similarly sketchy as to complaints or findings regarding the claimant's arthritis. According to Exhibit 23, the claimant was seen two to three times in 1977, once in 1984, and once in 1986, then twice in 1987. None of these entries, insofar as they are legible, appear to reflect complaints or treatment of the claimant for joint pain. The last entry, dated August 27, 1992, approximately 5 years after the previous entry in Dr. Crain's treatment notes, indicates the claimant was being followed for rheumatoid arthritis, with references here to the claimant's shoulders, hand, and elbows (emphasis added) (TR 18).

Consultative examinations were performed by Dr. David B. Dean and Dr. E. Joseph Sutton, II (TR 120, 134). Dr. Dean examined the plaintiff in June of 1992. He found her to be "alert, oriented and appropriate during the exam. She is neat in personal appearance and well-groomed. She drove herself to the exam" (TR 120). Dr. Dean's physical examination noted:

> EXTREMITIES: Examination of both hands reveals full range of motion of both hands without erythema, swelling or tenderness. Grip in both hands is equal and full and fine motor movements are easily performed in acts of grooming and self care with both hands. ELBOWS: Examination of both elbows reveals full range of motion of both elbow joints, without erythema, swelling or tenderness noted. SHOULDERS: There is full range of motion of both shoulder girdles, without erythema, swelling or tenderness noted. Please see range of motion diagrams for further details. CERVICAL SPINE: There is mild tenderness to palpation of the cervical spine. However, there is full range of motion of the cervical spine in flexion, extension and rotation, as well as lateral flexion. There is no loss of muscle mass in either upper extremity and no loss of motor strength in either upper extremity. No sensory deficit is noted in either upper extremity. Deep tendon reflexes in both upper extremities are equal, full and physiological (TR 21).

Dr. Sutton examined the plaintiff in January of 1993 (TR 134). When asked about her activities the plaintiff stated that she drives, does not do any cooking or housework, but she "sits and reads and spends a great deal of time in the hot tub" (TR 135). Dr. Sutton's physical examination noted:

> EXTREMITIES: The patient does not have any evidence of hot or swollen

> joints. She has good bilateral grip strength. I helped the patient off the table, from the supine position, and she had a good firm grip in this process. The patient's back study demonstrated a completely normal range of motion study. The patient has some minor restriction of the range of motion of the right shoulder and about the most that she is able to raise her right shoulder is 110 degrees anteriorly or laterally. The patient walked with a normal gait and speed. She walked across our parking lot without any difficulty and got in a van and drove off (TR 135).

There is no merit to plaintiff's first claim. There is substantial evidence in the record to support the decision of the ALJ that the plaintiff can perform her past relevant work and, therefore, is not disabled. The medical evidence reveals that she has a good range of motion unhindered by arthritis (TR 121, 122-24, 135). As the ALJ noted, "the medical evidence does not contain clinical findings and laboratory tests to support the claimant's allegations of totally disabling pain . . . ." (TR 16). The reports of all physicians who examined her are significant in their lack of any limitations placed upon her based upon the objective evidence (TR 116, 120, 129, 134).

There is also no merit to plaintiff's second assertion that the ALJ erred in applying the factors for disabling pain as set forth in Luna v. Bowen, 834 F.2d at 165-66. Pain, even if not disabling, is a nonexertional impairment to be taken into consideration, unless there is substantial evidence for the ALJ to find that the claimant's pain is insignificant. Thompson v. Sullivan, 987 F.2d 1482 (10th Cir. 1993). Both physical and mental impairments can support a disability claim based on pain. Turner v. Heckler, 754 F.2d 326, 330 (10th Cir. 1985). However, the Tenth Circuit has said that "subjective complaints of pain must be accompanied by medical evidence and may be disregarded if unsupported by any clinical findings." Frey v. Bowen, 816 F.2d 508, 515 (10th Cir. 1987). The court in Luna v. Bowen, 834 F.2d at 165-66, discussed what a claimant must show to

prove a claim of disabling pain:

> [W]e have recognized numerous factors in addition to medical test results that agency decision makers should consider when determining the credibility of subjective claims of pain greater than that usually associated with a particular impairment. For example, we have noted a claimant's persistent attempts to find relief for his pain and his willingness to try any treatment prescribed, regular use of crutches or a cane, regular contact with a doctor, and the possibility that psychological disorders combine with physical problems. The Secretary has also noted several factors for consideration including the claimant's daily activities, and the dosage, effectiveness, and side effects of medication. Of course no such list can be exhaustive. The point is, however, that expanding the decision maker's inquiry beyond objective medical evidence does not result in a pure credibility determination. The decision maker has a good deal more than the appearance of the claimant to use in determining whether the claimant's pain is so severe as to be disabling. (Citations omitted).

See also, Hargis v. Sullivan, 945 F.2d 1482, 1489 (10th Cir. 1991).

Pain must interfere with the ability to work. Ray v. Bowen, 865 F.2d 222, 225 (10th Cir. 1989). A claimant is not required to produce medical evidence proving the pain is inevitable. Frey, 816 F.2d at 515. He must establish only a loose nexus between the impairment and the pain alleged. Luna, 834 F.2d at 164. "'[I]f an impairment is reasonably expected to produce some pain, allegations of disabling pain emanating from that impairment are sufficiently consistent to require consideration of all relevant evidence.'" Huston v. Bowen, 838 F.2d 1125, 1129 (10th Cir. 1988) (quoting Luna, 834 F.2d at 164).

Because there was some objective medical evidence to show that plaintiff had joint pain, the ALJ was required to consider the assertions of severe pain and to "decide whether he believe[d them]." Luna, 834 F.2d at 163; 42 U.S.C. § 423(d)(5)(A). However, "the absence of an objective medical basis for the degree of severity of pain may affect the

weight to be given to the claimant's subjective allegations of pain, but a lack of objective corroboration of the pain's severity cannot justify disregarding those allegations." Luna, 834 F.2d at 165. This court need not give absolute deference to the ALJ's conclusion on this matter. Frey, 816 at 517.

Plaintiff's complaints of disabling pain are not consistent with the record as a whole. As the ALJ noted, due to the lack of objective evidence "a determination of disability must rest solely upon subjective complaints" (TR 16). Plaintiff complains that "the ALJ improperly discredited the plaintiff's allegations of disabling pain" on ". . . the sole ground that there was no objective evidence to support [her allegations]." (Plaintiff's Brief, Page 2). In support of her argument, the plaintiff relies on statements made by the ALJ and his decision to disregard Dr. Sutton's RFC evaluation. (Plaintiff's Brief, Page 2-3).

Plaintiff's reliance on statements made by the ALJ ignores other portions of the decision. The ALJ, acknowledging the lack of objective medical evidence, expanded his inquiry to make a credibility determination. The ALJ relied on the medications and treatments employed by the plaintiff (TR 17), the lack of side effects (TR 17), contacts with doctors (TR 18), and the possible psychological aspects of her condition (TR 18). The ALJ also considered statements made by the plaintiff to the treating and consultative physicians contrasted with her testimony concerning her daily activities (TR 17). All of these are proper areas of inquiry under the Luna decision and its resulting framework.

The ALJ disregarded Dr. Sutton's more restrictive RFC evaluation (TR 19). Plaintiff asserts this was an error, characterizing the ALJ's rejection of the evaluation as resting upon the absence of objective evidence. (Plaintiff's Brief, Page 3). Plaintiff has misread

the ALJ's opinion. The ALJ properly recognized that the RFC evaluation, and the conclusions upon which it is based, was "largely a reflection of the claimant's complaints, the veracity of which is at issue on the claimant's application for disability" (TR 19). Credibility determinations are the province of the ALJ's evaluation of the plaintiff's allegations of disabling pain. The ALJ, having found the plaintiff not credible to the extent that her allegations of pain would preclude past relevant work, did not err in disregarding Dr. Sutton's RFC evaluation. Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

Plaintiff's last assertion is that the ALJ's finding that the plaintiff can return to past relevant work is flawed as a matter of law and not supported by substantial evidence. Plaintiff claims that, because the ALJ failed to make specific findings as to the demands of her former work as a clerical cashier, the analysis was fatally flawed, citing SSR 82-62. The pertinent part of that statute states:

> In finding that an individual has the capacity to perform a past relevant job, the determination or decision must contain among the findings the following specific findings of fact:
>
> 1. A finding of fact as the individual's RFC.
> 2. A finding of fact as to the physical and mental demands of the past job/occupation.
> 3. A finding of fact that the individual's RFC would permit a return to his or her past job or occupation.

The ALJ complied with this regulation. He clearly discussed the plaintiff's RFC (Finding No. 5, TR 20), and went on to find that "according to the Dictionary of Occupational Titles, this position (DOT No. 211.362-010) is identified as sedentary work" (TR 20). He later noted that plaintiff could not do work involving the ability to lift more than twenty pounds at a time, lift/carry more than ten pounds frequently, stand/walk more

than six hours in an eight-hour day, and to do more than occasional stooping. He noted that her past relevant work as a cashier (which she described as involving lifting fifty pounds (TR 95)) was precluded by the above limitations, but the work, as performed within the national economy, was not precluded by them (TR 20).

The ALJ made a finding of fact that she could return to her past relevant work as performed within the national economy (TR 21). Relying on the position as described in the DOT was proper, as 20 C.F.R. §404.1520 recognizes administrative notice of this job data. Potter v. Secretary of Health and Human Services, 905 F.2d 1346, 1349 n.3 (10th Cir. 1990). At this point, the burden of proof was on plaintiff to show she could not return to her past work as described. Id. at 349. This burden does not shift to the Secretary until after a claimant establishes a disability which prevents him from performing his past relevant work. Turner v. Heckler, 754 F.2d at 328. Because plaintiff failed to meet her burden, the ALJ was under no obligation to elicit the testimony of a vocational expert. Walden v. Bowen, 813 F.2d 1047, 1049 (10th Cir. 1987).

There is substantial evidence that plaintiff can do a job requiring sitting, reaching, and handling. There is no medical evidence to show plaintiff "must alternate sitting and standing, is limited in her ability to repetitively grasp with her hands, and can only occasionally reach." (Plaintiff's Brief, Docket No. 6, Page 5).

The decision of the ALJ is supported by substantial evidence and is a proper application of the regulations. It is affirmed.

Dated this 4th day of August, 1995.

JOHN LEO WAGNER
UNITED STATES DISTRICT JUDGE

t:fronko

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

AUG 4 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

THOMAS R. HUTCHINSON, as Personal Representative of the Estate of Robert W. Hutchinson, deceased,

Plaintiff,

vs.

RICHARD PFEIL and MARY JO PFEIL,

Defendants.

Case No. 92-C-1088-E

ENTERED ON DOCKET
DATE AUG 07 1995

J U D G M E N T

In accord with the Order filed this date sustaining the Defendants' Motion for Summary Judgment, the Court hereby enters judgment in favor of the Defendants, Richard B. Pfeil and Mary Joan Pfeil, and against the Plaintiff, Thomas R. Hutchinson, as Personal Representative of the Estate of Robert W. Hutchinson. Plaintiff shall take nothing of his claim. Costs and attorney fees may be awarded upon proper application.

Dated, this 4TH day of August, 1995.

JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

180

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 4 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

THOMAS R. HUTCHINSON, as Personal Representative of the Estate of Robert W. Hutchinson, deceased,

Plaintiff,

vs.

RICHARD PFEIL and MARY JO PFEIL,

Defendants.

Case No. 92-C-1088-E

ENTERED ON DOCKET
DATE AUG 07 1995

O R D E R

Now before the Court is the Motion for Summary Judgment (Docket #141) of the Defendants Richard Pfeil and Mary Jo Pfeil ("the Pfeils").

Thomas Hutchinson brings this action claiming that he has an undivided one-third interest in and title to the painting "Summer Hillside" by Theodore Robinson. He requests partition of the property and an accounting by his cotenants, the Pfeils. Plaintiff alleges that Robinson died in 1896, and that through the laws of intestacy, several of Robinson's works, including "Summer Hillside," passed first to Robinson's brother, Hamline, and then to Hamline's widow, Florence Robinson, and her two daughters, Fonnie Hutchinson and Nellie Terhune. In 1912, Florence Robinson sold "Summer Hillside" and several other Robinson Paintings to William Macbeth.

After successive transfers, in December 1986, the Pfeils acquired "Summer Hillside" at a public auction from Sotheby's in New York City. In this lawsuit, Plaintiff alleges that Florence Robinson lacked the legal capacity to sell "Summer Hillside" to

179

Macbeth in 1912. Plaintiff brings this action as the personal representative of the estate of Robert W. Hutchinson, alleged to be a descendant of Fonnie Hutchinson.

It is undisputed that Hamline died in 1907 and the his collection of Robinson's paintings passed to his wife and two daughters. Florence Robinson had possession of the collection when she sold "Summer Hillside" in 1912. Florence Robinson died in 1927, and her daughters took possession of the remaining paintings. Fonnie Hutchinson died in 1945, and her interest passed to her two heirs: her husband, Harry Hutchinson, and her son, Robert Hutchinson. When Harry Hutchinson died in 1948, his interest passed to Robert Hutchinson.

Defendants filed a motion for summary judgment, asserting that Plaintiff's claim is based on speculation and guesswork, and is barred by laches, the statute of limitations, or the doctrine of collateral estoppel. Defendants also urge that plaintiffs are equitably estopped from claiming an interest in "Summer Hillside."

Legal Analysis

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265, 274 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Windon Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

> "The plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986).

Defendants argue that Plaintiff's claim is barred by both the statute of limitations and laches. Defendants assert that Oklahoma law controls this issue, and that the two year limitation pertaining to "an action for taking, detaining, or injuring personal property, including actions for the specific recovery of personal property" is applicable. Okla.Stat.tit.12, §95 (third). Defendants argue that the statute of limitations would begin to run when the injured party (here, Plaintiff or the person from whom he acquired his interest) knows, or in the exercise of due diligence, should have known of the injury. Thus, the action would accrue when Fonnie Hutchinson (from whom Plaintiff acquired an interest) either knew or should have known of the sale of the painting by Florence Robinson.

With respect to laches, Defendants argue that they are able to demonstrate both elements of this defense: 1) an inexcusable delay in instituting suit, and (2) prejudice or injury to the defendant as a result of the inexcusable delay. See Brunswick Corp

v. Spinit Reel Co., 832 F.2d 513 (10th Cir. 1987). Defendants argue that the inexcusable delay comes from the fact that Fonnie Hutchinson was aware of the painting since 1907, and allowed it to remain in the possession of her mother. Defendants claim prejudice from the fact that witnesses who would have personal knowledge of the transaction at issue are deceased and from the fact of economic damage by virtue of their purchase of "Summer Hillside."

Plaintiff argues that neither the statute of limitations nor laches would bar an action by one cotenant against another cotenant until actual ouster by the cotenant or some act amounting to a total denial of the rights of the latter and until notice or knowledge of the ouster is brought home to him. Bevan v. Shelton, 469 P.2d 245, 249-50 (Okla. 1970).

> A cotenant must have actual notice or knowledge that his rights are being disputed before the statute of limitations will begin to run against him, or the acts or conduct relied upon to establish a denial or repudiation of a cotenants rights must be so inconsistent with his rights that he reasonably should inquire into the status of his interest in the property.

Tatum v. Jones, 491 P.2d 283, 285 (Okla. 1971).

> The notice or knowledge required must be either actual, or act or acts relied on as an ouster must be of such an open and notorious character as to be notice of themselves, or reasonably sufficient to put the disseized cotenant on inquiry, which, if diligently pursued, will lead to notice or knowledge of the fact.

Preston v. Preston, 207 P.2d 313, 319 (Okla. 1949)(citing Beaver v. Wilson, 117 Okl. 68, 245 P. 34, 35 (1926)). Plaintiff specifically notes that possession by one cotenant is not inconsistent with another cotenant's rights. Daugherty v. Breeding, 553 S.W.2d 299 (Ky 1977).

Plaintiff's statement of the law is correct. However, the Beaver court specifically noted that "[i]n Beall v. McMenemy, 88 N.W. 134, 63 Neb. 70, 93 Am. St. Rep. 427, it held that a sale of land by one cotenant while in sole possession, followed by the exclusive possession by his grantee for 14 years, constitutes an ouster of the other cotenant, and completes the bar of the statue of limitations against him." Moreover, in Daugherty, the Court noted that the statute of limitations would begin to run when the property was removed from the cotenant's possession. Id.

Pursuant to these authorities, the Court finds that Plaintiff's claim in this case is barred by the Statute of Limitations and Laches.[1] Florence Robinson did not have possession of "Summer Hillside" as of 1912. Moreover, her grantee or subsequent purchasers have had sole possession of the painting since that time. Certainly the fact that she no longer had possession was sufficient to put the cotenants on notice that their ownership was being disputed. Even if notice was not sufficient at that time, after Florence Robinson died, Fonnie Hutchinson was entitled to possession of the paintings and could have determined that "Summer Hillside" was missing.[2] Sufficient time has passed

---

[1] While collateral estoppel is not the basis for summary judgment in this case, the Court notes that Plaintiff's similar claims with regard to other paintings by Theodore Robinson were held to be barred by the doctrine of laches in a related case in Evansville Indiana.

[2] Plaintiff also argues that the statute of limitations would be tolled by the concealment of William MacBeth, who purchased the painting, and John I.H. Baur, who published a catalogue of Robinson's works in 1947. The "concealment" comes from the fact that the catalogue by Baur does not reveal Florence Robinson as

since those events to find that the statue of limitations has run and that there has been "an inexcusable delay in bringing suit." Moreover, Defendants arguments regarding prejudice are not mere "conclusory statements" but are borne out by the totality of the evidence presented by both sides. The documentary evidence is clearly inconclusive, and prejudice results from the unavailability of key witnesses.

Defendants' motion for summary judgment is granted.

IT IS SO ORDERED THIS 3RD DAY OF AUGUST, 1995.

JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

---

having sold "Summer Hillside" to MacBeth Galleries. This "concealment" argument ignores the fact that Fonnie Hutchinson had access to the paintings while they were in the possession of her mother and sister and could have determined at that time whether "Summer Hillside" was missing.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OKLAHOMA

OVERHEAD DOOR COMPANY OF TULSA, INC., an Oklahoma Corporation,
Plaintiff,

vs.

MID-SOUTH IRON WORKERS PENSION FUND, BY ITS TRUSTEES, et al.,
Defendants,

and

ALBERT C. MINCEY, et al.,
Plaintiffs,

vs.

OVERHEAD DOOR COMPANY OF TULSA, d/b/a OVERHEAD DOOR COMPANY OF TULSA, INC., et al.,
Defendants

CIVIL ACTION

No. 93C532 E
c/w 93-C-893-E

ORDER

Considering the above and foregoing,

IT IS HEREBY ORDERED that plaintiffs' claims against defendant Overhead Door are dismissed with prejudice.

This 4 day of Aug, 1995.

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 03 1995

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

DAVID M. LUKE,

Plaintiff,

v.

SHIRLEY S. CHATER,
Commissioner of Social Security,[1]

Defendant.

Case No: 93-C-745-W

ENTERED ON DOCKET

DATE AUG 04 1995

AMENDED JUDGMENT

Judgment is entered in favor of the Plaintiff, David M. Luke, in accordance with this court's Order Granting Plaintiff's Rule 59(e) Motion to Alter or Amend Judgment, filed August 3rd, 1995.

Dated this 3rd day of August, 1995.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

[1]Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the Court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

23

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DAVID M. LUKE,

Plaintiff,

v.

SHIRLEY S. CHATER, COMMISSIONER OF SOCIAL SECURITY,[1]

Defendant.

Case No. 93-C-745-W

ORDER GRANTING PLAINTIFF'S RULE 59(e) MOTION TO ALTER OR AMEND JUDGMENT

On June 30, 1995, the court issued an order sustaining the finding of the Commissioner denying benefits to the claimant. On July 11, 1995, Plaintiff filed his motion to reconsider, citing authorities not initially considered by this court. On July 18, 1995, this court entered an order which construed that motion as a Rule 59(e) motion to alter or amend judgement, and allowed the Secretary 15 days in which to respond. On July 28, 1995 the Secretary filed a response. Upon consideration of the motion and response, the authorities respectively cited, and reexamination of the record in light of those authorities, the court has determined that amendment of the judgment previously entered on July 7, 1995 is in the interest of justice, and consequently the Plaintiff's Rule 59(e) motion is granted.

On February 23, 1995 the Tenth Circuit Court of Appeals issued its decision in Cruse v. United States Department of Health & Human Services, 49 F.3d 614 (10th Cir. 1995),

[1]Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

22

defining the meaning of "fair" in Residual Functional Capacity Forms evaluating social security claimants. These forms are designed to determine the individual's ability to do work-related activities on a day-to-day basis in a regular work setting. The forms require evaluation of a claimant's abilities in three work-related areas: making occupational adjustments, making performance adjustments, and making personal-social adjustments. The forms evaluate the claimant's abilities as "unlimited/very good," "good," "fair," and "poor or none."

The court in Cruse concluded that the forms' definition of "fair" is misleading. "Though describing a functional ability as fair would imply no disabling impairment, fair is defined to mean: 'Ability to function in this area is seriously limited but not precluded.' We conclude that 'seriously limited but not precluded' is essentially the same as the listing requirements' definition of the term 'marked'. . . ." Id. at 618.

The court noted that the Listing of Impairments found in 20 C.F.R. Pt. 404, Subpt. P, App.1, §12.00 C states:

> Where 'marked' is used as a standard for measuring the degree of limitation, it means more than moderate, but less than extreme. A marked limitation may arise when several activities or functions are impaired or even where only one is impaired, so long as the degree of limitation is such as to seriously interfere with the ability to function independently, appropriately and effectively.

Id.

The Cruse Court concluded that "fair" as that term is defined on the medical assessment form is "evidence of disability." Id. (emphasis in original).

As claimant notes, in this case the Residual Functional Capacity Form completed by Dr. Thomas Goodman on September 23, 1992 (TR 262-264) showed that claimant's

abilities to deal with work stresses and function independently were only "fair," and therefore he was markedly impaired in these areas (TR 262).[2] Since Dr. Goodman found that the claimant was markedly impaired in these two categories, this should have been made clear in the ALJ's hypothetical questions to the vocational expert at the hearing (TR 72-76).[3]

Claimant also notes that the court in Washington v. Shalala, 37 F.3d 1437, 1442 (10th Cir. 1994), stated:

> '[a] finding that a claimant is able to engage in substantial gainful activity requires more than a simple determination that the claimant can find employment and that he can physically perform certain jobs; it also requires a determination that the claimant can hold whatever job he finds for a significant period of time.'

(citing Singletary v. Bowen, 798 F.2d 818, 822 (5th Cir. 1986)). When Plaintiff's counsel

---

[2]Claimant also points out that Dr. Goodman never saw any of the medical reports relating to claimant (TR 259) and based his evaluation on one examination. An evaluation by a reviewing doctor does not outweigh credible evidence provided by treating physicians. Harris v. Secretary of Health & Human Services, 821 F.2d 541, 544 (10th Cir. 1987). However, the ALJ in this case gave valid reasons for giving great weight to Dr. Goodman's report (TR 18).

[3]The Secretary notes, on page 2 of her response, that the ALJ recognized the proper definition of "fair" in his decision. On pages 23-24 of the record, the ALJ stated that:

> Claimant's ability to deal with work stresses and function independently were rated as fair. "Fair" was defined as the ability to function in this area as seriously limited but not precluded. The Administrative Law Judge finds that claimant's allegations of his mental impairments will be amply compensated for by limiting claimant to performing medium exertional activity.

Although the ALJ recognized the proper definition of "fair" in his decision, this definition was not shared with the vocational expert at the time the ALJ's hypothetical questions were considered. The ALJ stressed, in his hypothetical, that Plaintiff would have fair ability "to deal with work stresses... [and] function independently." (TR 73-74). In light of the Tenth Circuit's decision in Cruse, this was misleading. Had the ALJ had the benefit of the Cruse decision, he would have no doubt modified this hypothetical to reflect that Plaintiff's ability to deal with work stresses and function independently was "seriously limited but not precluded", or "marked". With this interpretation, Dr. Goodman's diagnosis is much more consistent with the first-hand observations of the social workers assigned to Plaintiff's case. Although the social workers' reports do not rise to the level of expert medical opinion, they are nevertheless probative of Plaintiff's psychiatric state.

From the subsequent testimony elicited from the expert by Plaintiff's counsel, the court reasonably concludes that the expert would likely have found the Plaintiff unable to maintain any substantial gainful activity had the hypothetical been properly postulated. However, the fact remains that the hypotheticals were not properly postulated, and at the fifth step of the sequential evaluation, it is the burden of the Secretary to establish, by means of expert testimony elicited in response to a properly presented hypothetical question, that the claimant's impairment does not prevent him from doing other relevant work available in the national economy. The Secretary has failed to carry that burden, and an award of benefits is therefore appropriate.

asked certain hypothetical questions concerning claimant's inability to behave in an emotionally-stable manner and handle work stresses, the vocational expert admitted this would not inhibit claimant from obtaining employment, but would inhibit him from keeping employment (TR 79-80). Saundra Crittenden, an outpatient therapist who has treated him, stated he has frequently been fired from jobs or quit and concluded he cannot maintain employment (TR 272). Dr. John T. Brauchi, the Medical Director at Parkside Clinic, signed the report including this information (TR 272).[4]

The decision contained in this court's Order of June 30, 1995 affirming the decision of the ALJ is withdrawn, and the final decision of the ALJ is reversed and claimant is found to be disabled and entitled to disability insurance benefits under §§ 216(i) and 223 and supplemental security income under §§ 1602 and 1614 (a)(3)(A) of the Social Security Act, as amended.

Dated this 3rd day of August, 1995.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:Luke.SS

[4]The Secretary properly objects to any consideration by this court of the "updated" Parkside reports appended to Plaintiff's February 1994 brief, and referenced on page three of the Plaintiff's motion currently under consideration. This objection to consideration of materials outside the record is sustained, and the court has not reviewed or otherwise taken those reports into consideration in deciding this case.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

ERIC DEWAYNE BROWN,

Plaintiff,

vs.

DEBBIE GLENN, et al.,

Defendants.

No. 95-C-523-H

ORDER

Before the court is Plaintiff's pro se motion for leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915 and civil rights complaint pursuant to 42 U.S.C. § 1983. Plaintiff's motion for leave to proceed in forma pauperis is granted. Upon review of the complaint and for the reasons set forth below, the court finds that venue is not proper in this district court and concludes that this action should be transferred to the proper district. See Costlow v. Weeks, 790 F.2d 1486 (12th Cir. 1986) (court has the authority to raise venue issue sua sponte).

The applicable venue provision for this action is found under 28 U.S.C. §1391(b) which provides as follows:

> A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

There is no applicable law with regard to venue under 42 U.S.C. § 1983 which would exempt this case from the general

3

provisions of 28 U.S.C. § 1391(b). Coleman v. Crisp, 444 F. Supp. 31 (W.D. Okla. 1977); D'Amico v Treat, 379 F. Supp. 1004 (N.D. Ill. 1974).

Plaintiff bases his Complaint on allegations that Defendants unreasonably searched his cell during his pretrial detention at a jail in McAlester, Oklahoma. According to the Complaint, both Defendants are residents of McAlester, Oklahoma and employees of the jail there. The Court takes judicial notice that the city of McAlester is located within the Eastern District of Oklahoma. 28 U.S.C. § 116. Thus, it is clear that venue is not proper before this Court.

When venue is not proper, the Court may dismiss the action, or if it be in the interest of justice, may transfer the case to the district in which it should have been brought. 28 U.S.C. §1406(a). Due to the fact that many of Plaintiff's documents are handwritten, the undersigned finds that it would be in the best interest of justice and judicial efficiency to transfer the case to the proper district. **ACCORDINGLY, IT IS HEREBY ORDERED that** Plaintiff's motion for leave to proceed in forma pauperis (doc. #2) is **granted**, and this matter is hereby **transferred** to the United States District Court for the Eastern District of Oklahoma.

IT IS SO ORDERED.

This 3rd day of Aug, 1995.

for Thomas R. Brett

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

F I L E D

AUG - 3 1995

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

JERRY L. HAYDEN,

Plaintiff,

v.

HARTFORD LIFE INSURANCE CO., a Connecticut corporation,

Defendant.

Case No. 95-C-299-BU

ENTERED ON DOCKET

DATE AUG 04 1995

ORDER OF DISMISSAL WITH PREJUDICE

Upon the Joint Application for a Dismissal With Prejudice filed by the Plaintiff and the Defendant Hartford Life Insurance Company, and for good cause shown therein, IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the above-styled and numbered cause of action is hereby dismissed with prejudice to the filing of any further cause of action.

DATED this 3rd day of August, 1995.

s/ MICHAEL BURRAGE

JUDGE, UNITED STATES DISTRICT COURT

PLD/94808.1

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

CURTIS SCHMELING,)
)
Plaintiff,)
)
vs.) Case No. 95-C-143-BU
)
NORDAM, a corporation,)
)
Defendant.)

ORDER

The plaintiff, Curtis Schmeling, commenced this action in the District Court in and for Tulsa County, State of Oklahoma. In his petition, the plaintiff alleges that on September 20, 1994, he was given a drug test at the request of his employer, the defendant, Nordam. The plaintiff alleges that he does not know whether the drug test complied with industry standards of care with respect to drug tests. However, the test indicated he had taken a controlled substance. In light of the test indication, the plaintiff was placed in a drug treatment program. On October 17, 1994, the plaintiff was given a second drug test. The plaintiff again alleges that he does not know whether this second drug test complied with industry standards of care. The plaintiff, however, alleges that regardless of whether the second drug test complied with industry standards of care, the second test indicated no controlled substances. Thereafter, the plaintiff sought to return to work with the defendant. On November 4, 1994, the plaintiff was notified by the defendant's attorney that he had been fired by the defendant. Based upon these factual allegations, the plaintiff asserts three claims against the defendant, namely, violation of

the Standards for Workplace Drug and Alcohol Testing Act, Okla. Stat. tit. 40, § 551, et seq., discharge in violation of Oklahoma's public policy and intentional infliction of emotional distress.

The defendant timely removed this action to this Court pursuant to 28 U.S.C. § 1441(b) on the basis that the plaintiff's state law claims against the defendant are completely preempted by the Federal Aviation Regulations, 14 C.F.R. Parts 121 and 135. Shortly thereafter, the defendant moved to dismiss the plaintiff's petition pursuant to Rule 12(b)(6), Fed.R.Civ.P., claiming the plaintiff lacks standing to assert his claims. After reviewing the parties' submissions in regard to the motion, the Court, in accordance with Rule 12(b), Fed.R.Civ.P., advised the parties that it was converting the defendant's motion to one for summary judgment. The Court granted the parties additional time to file any further materials relating to the motion. The parties have now submitted the additional materials. The plaintiff has also filed a motion to amend his petition, to which the defendant has responded. Having reviewed all the parties' submissions, the Court now makes its determination.

In its motion, the defendant states that it has three divisions which operate under agency certificates issued by the Federal Aviation Administration ("FAA"). The defendant asserts that it is required by 14 C.F.R. § 121.457 to have a drug and alcohol testing program that complies with FAA's regulations. According to the defendant, the plaintiff worked in its repair division, which was subject to such a program. The defendant

contends that FAA's regulations governing drug and alcohol testing completely preempt any state law covering the same subject matter. Consequently, the defendant contends that the plaintiff's claims which are based upon Oklahoma's drug testing law are preempted. Furthermore, the defendant contends that dismissal of the plaintiff's action based upon the federal regulations is required as the administrator of the FAA is the only party with standing to enforce the FAA's drug testing regulations.

The plaintiff, in response, contends that under 49 U.S.C. § 45106(a), only inconsistent state laws are preempted by federal aviation regulations. The plaintiff argues that Oklahoma's drug testing law is not inconsistent with federal law, and therefore, is not preempted. The plaintiff also asserts that 49 U.S.C. § 40120(c), which provides that any remedy "under this part is in addition to any other remedies provided by law," is strong evidence that his state laws claims are not preempted. In addition, the plaintiff contends that his claims are not preempted as the defendant's drug testing is required by contract rather than federal law. The plaintiff further claims he is not an "employee" who is required to be drug tested under the FAA regulations. Therefore, because federal law does not preempt his action under state law, the plaintiff contends that the Court lacks subject matter jurisdiction over this action.

Assuming arguendo his claims are preempted by federal law, the plaintiff additionally contends that he has standing to challenge his termination under federal law. The plaintiff argues that

federal law clearly contemplates a private right of action for wrongful discharge based upon drug testing violations. The plaintiff further asserts that he meets the traditional standing requirements, i.e. injury in fact and within the zone of interest.

The Court finds the plaintiff's claims, which are all based upon the defendant's alleged violations of the Standards for Workplace Drug and Alcohol Testing Act, Okla. Stat. tit. 40, § 551, et seq., are preempted by the federal regulations set forth in 14 C.F.R. Parts 121 and 135 (1994 edition). 14 C.F.R. Part 121, App. I, section XI(A) specifically provides:

> The issuance of these regulations by the FAA preempts any State or local law, rule, regulation, order, or standard covering the subject matter of this rule, including but not limited to, drug testing of aviation personnel performing sensitive safety- or security-related functions. (emphasis added).

Federal regulations have no less preemptive effect than federal statutes. Hillsborough County, Fla. v. Automated Medical Laboratories, Inc., 471 U.S. 707, 713, 105 S.Ct. 2375, 85 L.Ed.2d 714 (1985); Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 699, 104 S.Ct. 2694, 2700, 81 L.Ed.2d 580 (1984); Fidelity Federal Savings & Loan Ass. v. De la Cuesta, 458 U.S. 141, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982). Indeed, federal regulations may completely preempt state law in a particular area and "render unenforceable state and local laws that are otherwise not inconsistent with federal law." City of New York v. FCC, 486 U.S. 57, 63-64, 108 S.Ct. 1637, 1642, 100 L.Ed.2d 48 (1988). Although the plaintiff argues the Standards for Workplace Drug and Alcohol Testing Act is

consistent with the federal regulations, it is clear from section XI(A) that the federal regulations set forth in 14 C.F.R. Parts 121 and 135 are intended by the FAA to have a complete preemptive effect regarding the subject of drug testing.[1]

The plaintiff's reliance upon 49 U.S.C. § 45106(a) and 49 U.S.C. § 40120(c) to support his non-preemption position is misplaced. Contrary to the plaintiff's contention, section 45106(a) does not provide that only state laws, which are inconsistent with applicable federal drug testing guidelines, are preempted. What section 45106(a) provides is that a state or local government may not prescribe, issue or continue in effect a law "inconsistent with regulations prescribed under this chapter." Section XI(A) is one of those regulations. Thus, section 45106(a) does not establish that Oklahoma's drug testing law is not preempted. As to section 40120(c), the Court notes the section contains a general saving clause. Because section XI(A) has an express preemption provision governing drug testing, the Court finds the savings clause of section 40120(c) similarly does not establish that state laws relating to drug testing are not preempted. Morales v. Trans World Airlines, Inc., 504 U.S. 374,

[1]The plaintiff has not advanced any argument that the FAA's decision to preempt state law was not congressionally authorized or not a reasonable exercise of its authority. See, State of Kansas ex. rel. Todd v. United States, 995 F.2d 1505, 1509 (10th Cir. 1993). In any event, the Court finds that the FAA neither exceeded its statutory authority nor acted arbitrarily in promulgating section XI(A).

384-385, 112 S.Ct. 2031, 2037, 119 L.Ed.2d 157 (1992).[2]

In addition, the Court finds the plaintiff's contentions that his claims are not preempted because the defendant was not required by federal law to conduct drug testing and that he was not an "employee" covered by the federal regulations are not compelling. 14 C.F.R. § 121.457 not only requires Parts 121 and 135 certificate holders to conduct drug testing, but also requires Parts 121 and 135 certificate holders to use contractors, such as the defendant, who conduct drug testing in accordance with the federal regulations. Moreover, the FAA, in interpreting the federal regulations, concludes contractors who provide covered service to Federal Aviation Regulations Part 121 and Part 135 operators must establish a drug testing program. (Exhibit "C", Defendant's Reply to Plaintiff's Response to Defendant's Motion to Dismiss). Deference is generally accorded to the FAA's interpretation of its own regulations. Rocky Mountain Helicopter, Inc. v. FAA, 971 F.2d 544, 547 (10th Cir. 1992). Furthermore, the Court finds the plaintiff is an employee subject to testing. 14 C.F.R. Part 121, App.I, section III lists employees, either directly or by contract, performing "aircraft maintenance or preventive maintenance duties" as employees who must be tested. Maintenance is defined in 14 C.F.R. § 1.1 as "inspection, overhaul, repair, preservation, and

[2]The plaintiff has cited Cleveland By and Through Cleveland v. Piper Aircraft Corp., 985 F.2d 1438 (10th Cir. 1993), finding that certain state tort claims were not preempted by the Federal Aviation Act of 1958, 49 U.S.C.App. § 1301, et seq., and regulations thereto. The Court, however, finds the case unpersuasive as no express preemption provision was at issue.

the replacement of parts." Preventive maintenance "means simple or minor preservation operations and the replacement of small, standard parts not involving assembly operations." 14 C.F.R. § 1.1. The plaintiff has testified in his affidavit that he dissembled aircraft spoilers sent there by airlines for rebuilding. Although he does not characterize it as maintenance, the Court concludes that the plaintiff's function clearly falls within aircraft maintenance. Thus, the plaintiff was subject to FAA-mandated drug testing and his claims are preempted pursuant to section XI(A).[3][4]

As the Court has found the plaintiff's claims are preempted by the federal regulations of 14 C.F.R. Parts 121 and 135, the Court must determine whether the plaintiff may bring a private cause of action against the defendant for allegedly violating the federal regulations. Upon reviewing the applicable statutes, the Court

---

[3]Interestingly, the Court notes section 553 of the Standards for Workplace Drug and Alcohol Testing Act specifically exempts from its provisions drug testing required by and conducted pursuant federal law or regulation. Okla. Stat. tit. 40, § 553(C).

[4]The plaintiff, citing to English v. General Electric Company, 496 U.S. 72, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990), has also argued that even if his claim for intentional violation of the Standards for Workplace Drug and Alcohol Testing Act is preempted, his wrongful discharge and intentional infliction of emotional distress claims are not. The Court notes English involved a situation where Congress had not explicitly preempted state law by inserting specific preemptive language into the enactments governing the nuclear industry. In the instant case, however, the FAA has inserted specific preemptive language into its drug testing regulations that clearly and manifestly provide that state law covering drug testing is preempted. Thus, the plaintiff's wrongful discharge and intentional infliction of emotional distress claims which are based upon the defendant's alleged violations of the Standards for Workplace Drug and Alcohol Testing Act are preempted.

finds the plaintiff may not. 49 U.S.C. § 46106 only provides for the Administrator of the Federal Aviation Administration bringing a civil action in district court against a person to enforce the applicable federal statutes and regulations. Consequently, judicial enforcement of the federal regulations has been placed in the hands of the FAA Administrator, not private individuals.[5] The only action that a private party may bring in district court is an action to compel an air carrier to obtain a FAA certificate required by 49 U.S.C. § 41101(a)(1). The plaintiff herein has not alleged such an action. Furthermore, the Court finds 49 C.F.R. § 40.35 does not, as the plaintiff alleges, evidence the existence of a private cause of action. The regulation merely states that drug test results may be released "in a lawsuit, grievance, or other proceeding initiated by or on behalf of the individual." It does not specify which of the procedures an individual may bring in his own right and which must be brought "on behalf of the individual."[6]

Because the Court finds the plaintiff does not have standing to bring a private cause of action against the defendant for

---

[5]At the request of the FAA Administrator, the Attorney General may bring a civil action to enforce the federal regulations. 49 U.S.C. § 46107(b).

[6]Although a private party may not bring a civil action to enforce federal regulations, the Court notes that under 49 U.S.C. § 46101, a private party may file a complaint in writing with the FAA Administrator concerning a person violating the federal regulations. Also, a private party who is a "person interested in or affected by" a civil action to enforce federal regulations may be joined or permitted to intervene in the civil action. 49 U.S.C. § 46109.

enforcement of the federal regulations, the Court finds dismissal of the plaintiff's action is appropriate.

Based upon the foregoing,

1. The Court GRANTS Defendant's Motion to Dismiss (Docket Entry #3), which the Court has converted into a Motion for Summary Judgment. Judgment will issue forthwith.

2. Because the plaintiff's claims are preempted by the FAA's drug testing regulations and thus are federal claims, the Court declares MOOT Defendant's Motion to Amend His Petition (Docket Entry #9).

3. In light of the Court's granting summary judgment in favor the defendant, the Court declares MOOT the plaintiff's First Motion to Compel (Docket Entry #15).

ENTERED this 3rd day of August, 1995.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG - 5 1995

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

CURTIS SCHMELING,

Plaintiff,

vs.

NORDAM, a corporation,

Defendant.

Case No. 95-C-143-BU

ENTERED ON DOCKET
DATE AUG 04 1995

JUDGMENT

This matter came before the Court upon the motion of the defendant, Nordam, to dismiss, which the Court converted to one for summary judgment. The issues of the motion having been duly considered and a decision having been duly rendered,

It is ORDERED and ADJUDGED that judgment is entered in favor of the defendant, Nordam, and against the plaintiff, Curtis Schmeling, and that the defendant, Nordam, is entitled to recover of the plaintiff, Curtis Schmeling, its costs of action.

DATED at Tulsa, Oklahoma, this 3rd day of August, 1995.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

21

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

JULIE ANNE BENSON, as widow and personal representative of the Estate of Robert Marshall Benson, Deceased, and TIMOTHY JOHN BENSON and KATHERINE JEAN BENSON, minor children of Robert Marshall Benson, Deceased,

Plaintiffs,

vs.

FIRST COLONY LIFE INSURANCE COMPANY, a foreign insurance company,

Defendant.

Case No. 95-C-515-BU

ORDER

This matter comes before the Court upon Plaintiffs' Application for Dismissal Without Prejudice (Docket Entry #5). Defendant has responded to the motion and Plaintiffs have replied thereto. Upon careful consideration and for good cause shown, the Court hereby **GRANTS** Plaintiffs' Application. This matter is hereby **DISMISSED WITHOUT PREJUDICE.**

ENTERED this 3rd day of August, 1995.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

8

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE AUG 04 1995

CONNIE ALLEN DEWEES,)
)
Plaintiff,)
)
vs.) No. 95-C-530-K
)
WALLEY ALFORD, et al.,)
)
Defendants.)

FILED
AUG 3 1995
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

It has come to the Court's attention that upon leaving Eastern Oklahoma State Hospital, Vinita, Oklahoma, Plaintiff failed to notify the Court of his forwarding address and to submit signed Marshal forms for service on the named defendants. The Court is thus unable to proceed with service of process.

Accordingly, this action is hereby dismissed without prejudice for lack of prosecution.

SO ORDERED THIS 2 day of August, 1995.

Terry C. Kern

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

2

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CONNIE ALLEN DEWEES,

Plaintiff,

vs.

DR. LIZZARGA, et al.,

Defendants.

No. 95-C-531-B

ORDER

It has come to the Court's attention that upon leaving Eastern Oklahoma State Hospital, Vinita, Oklahoma, Plaintiff failed to notify the Court of his forwarding address and to submit signed Marshal forms for service on the named defendants. The Court is thus unable to proceed with service of process.

Accordingly, this action is hereby dismissed without prejudice for lack of prosecution.

SO ORDERED THIS 2nd day of Aug, 1995.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

2

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JOSEPH E. WOOD, PLAINTIFF,	)	
vs.	)	CASE NO. 93-C-1158-B
DONNA E. SHALALA, Secretary of Health and Human Services, [1] DEFENDANT.	)	

REPORT AND RECOMMENDATION

Plaintiff, Joseph E. Wood, seeks judicial review of a decision of the Secretary of Health & Human Services denying Social Security disability benefits.[2]

The role of the court in reviewing the decision of the Secretary under 42 USC § 405(g) is to determine whether there is substantial evidence in the record to support the decision of the Secretary, and not to reweigh the evidence or try the issues *de novo*. *Sisco v. U.S. Dept. of Health and Human Services*, 10 F.3d 739, 741 (10th Cir. 1993). In order to determine whether the Secretary's decision is supported by substantial evidence, the court must meticulously examine the record. However, the court may not substitute its discretion for that of the Secretary. *Musgrave v. Sullivan*, 966 F.2d 1371, 1374 (10th Cir. 1992). If supported by

---

[1] *Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. However, this Report and Recommendation continues to refer to the Secretary because she was the appropriate party at the time of the underlying decision.*

[2] *Mr. Wood's February 2, 1992 application for disability benefits was denied August 6, 1992, the denial was affirmed on reconsideration, September 15, 1992. A hearing before an Administrative Law Judge was held April 1, 1993. By order dated July 28, 1993 the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on November 30, 1993. The decision of the Appeals Counsel represents the Secretary's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.*

12

substantial evidence, the Secretary's findings are conclusive and must be affirmed. *Richardson v. Perales,* 402 U.S. 389, 390, 91 S.Ct. 1420, 1422, 28 L.Ed.2d 842, (1971). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* at 401, 91 S.Ct. at 1427.

Plaintiff alleges that the record does not support the determination of the Secretary by substantial evidence and that the ALJ failed to meet his burden of proof that Plaintiff retains the capacity to perform work, other than his past relevant work, available in the national economy. The undersigned United States Magistrate Judge finds that the Administrative Law Judge ("ALJ") has adequately and correctly set forth the relevant facts of this case and applied the proper legal principals to these facts. The Court therefore incorporates those findings into this Report and Recommendation, as the duplication of the ALJ's effort would serve no useful purpose.

The record of the proceedings before the Social Security Administration has been meticulously reviewed by the Court. Plaintiff asserts many broad physical and mental complaints: arthritis in the lumbar spine, knees, hands, carpal tunnel syndrome, varicose veins, headaches, numbness and weakness in the hands and legs, lower back pain and post traumatic stress syndrome. The Court notes that the medical records, while extensive, are devoid of objective evidence of impairment or combination of impairments which would serve to substantiate the Plaintiff's claims of pain and impairment. In 1989, Plaintiff suffered a non-displaced fracture of the right wrist [R.205, 204, 194] which healed [R.193]. Plaintiff testified at the hearing that he broke "several bones in the small part of [his] hand and wrists and it never healed correctly" [R.48]. However, the record contains no reports of examining or treating physicians that such is the case. Plaintiff testified that he was receiving treatment at the time

of the hearing by a "Dr. Miller" [R.52, 67, 69, 70] and listed medications prescribed by Dr. Miller [R.292]. There is no report or medical record or prescription receipt included in the record to evidence such treatment or even that Dr. Miller exists. Only once in the record are varicose veins noted to appear in Plaintiff's legs by a medical care provider [R.206]. All other references to the condition are in histories given by the Plaintiff to the physicians or examiners [R. 128, 191, 239] and in Plaintiff's testimony at the hearing where he exclaimed "they're not just located just in my legs, they're all over my body" [R.74]. Plaintiff's complaints that this condition causes him disabling pain is also unsubstantiated by the medical record. The remainder of his physical complaints are not diagnosed or treated by any medical care provider in the record except "by history".

Plaintiff claims disability due to "post traumatic stress syndrome". The cause of this condition is vague. At the hearing, Plaintiff stated he had suffered three traumas: loss of a wife and two sons in a traffic accident, beatings by an abusive father and service with the Army in Viet Nam. While the record contains references to some of these events during histories taken from the Plaintiff by examining physicians, psychologists and psychiatrists and in the notes of a therapist who treated him from July, 1991 to May, 1992, there is no medical documentation of the rage, outbursts, "violent behavior" or any other incapacitating psychological symptoms alleged by Plaintiff. The Court notes that the credibility of Plaintiff's alleged military service was questioned by several of the examiners as well as the ALJ. The Court agrees with the ALJ that the record itself strongly suggests that Plaintiff's "memories" of service in and injury

sustained in Viet Nam are delusional or fabricated.[3] The Court finds no support for Plaintiff's contention that the record provides objective evidence of injury causing post traumatic stress syndrome, much less disability resulting therefrom.

Plaintiff claims that the ALJ improperly suggested that Plaintiff was malingering and failed to articulate a sufficient basis for discrediting the Plaintiff's testimony as established in *Dodrill v. Shalala*, 12 F.3rd 915, (9th Cir. 1993). The applicable portion of that case states:

> It's not sufficient for the ALJ to make only general findings; he must state which pain testimony is not credible and what evidence suggests the complaints are not credible...He must either accept claimant's testimony or make specific findings rejecting it. [*citing Swenson v. Sullivan,* 876 F.2d 683 (9th Cir.1989)]

Dodrill at 918.

In the instant case, the ALJ's Decision cited a plethora of discrepancies in Plaintiff's statements both during his testimony and as noted by medical and psychological examiners. In fact, the ALJ's discussion of this point was specific, detailed and extensive and certainly met the standard for discrediting testimony due to incredibility of the witness.

The Court finds that the ALJ evaluated the record in accordance with the correct legal standards established by the Secretary and the courts. The Court also finds that there is substantial evidence in the record to support the ALJ's decision. Accordingly, the undersigned United States Magistrate Judge recommends that the decision of the Secretary finding Plaintiff not disabled be AFFIRMED.

In accordance with 28 U.S.C. § 636(b) and Fed.R.Civ.P. 72(b), any objections to this

---

[3] Plaintiff was born June 1, 1954 and testified to a January 1971 discharge from the Army [R.52]. Plaintiff told his therapist he served in the military for 2 years [R.257]. According to the Court's calculations, Plaintiff would have been 16 1/2 years old at the time of discharge and approximately 15 years old when he served in Viet Nam, which the Court finds highly unlikely.

Report and Recommendation must be filed with the Clerk of the Court within ten (10) days of the receipt of this Report. Failure to file objections within the time specified waives the right to appeal from a judgment of the district court based upon the findings and recommendations of the magistrate. *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

DATED this 2nd day of July, 1995.

Frank H. McCarthy

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
AUG - 2 1995
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

CECIL FAYE SHRUM, et al)
)
Plaintiffs,)
)
vs.) Case No. 90-C-1031-B
)
FIBREBOARD CORP., et al)
)
Defendants.)

ENTERED
DATE AUG 0 3 1995

JUDGMENT DISMISSING ACTION BY REASON OF SETTLEMENT

The Court has been advised by counsel that this action has been settled, or is in the process of being settled. Therefore, it is not necessary that the action remain upon the calendar of the Court.

IT IS ORDERED that the action is dismissed without prejudice. The Court retains complete jurisdiction to vacate this Order and to reopen the action upon cause shown that settlement has not been completed and further litigation is necessary.

IT IS FURTHER ORDERED that the Clerk forthwith serve copies of this Judgment by United States mail upon the attorneys for the parties appearing in this action.

IT IS SO ORDERED this 2nd day of August, 1995.

THOMAS R. BRETT, CHIEF JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

RODRIGO RAMIREZ, et al	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	Case No. 91-C-681-B
	)	
DANIEL CLUTE, et al	)	
	)	
Defendants.	)	

JUDGMENT DISMISSING ACTION BY REASON OF SETTLEMENT

The Court has been advised by counsel that this action has been settled, or is in the process of being settled. Therefore, it is not necessary that the action remain upon the calendar of the Court.

IT IS ORDERED that the action is dismissed without prejudice. The Court retains complete jurisdiction to vacate this Order and to reopen the action upon cause shown that settlement has not been completed and further litigation is necessary.

IT IS FURTHER ORDERED that the Clerk forthwith serve copies of this Judgment by United States mail upon the attorneys for the parties appearing in this action.

IT IS SO ORDERED this 2nd day of August, 1995.

THOMAS R. BRETT, CHIEF JUDGE
UNITED STATES DISTRICT COURT

26

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
AUG 2 1995
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

CONNIE ALLEN DEWEES,

Plaintiff,

vs.

EASTERN STATE HOSPITAL,

Defendant.

No. 95-C-529-H

ENTERED ON DOCKET
DATE AUG 0 3 1995

ORDER

It has come to the Court's attention that upon leaving Eastern Oklahoma State Hospital, Vinita, Oklahoma, Plaintiff failed to notify the Court of his forwarding address and to submit a signed Marshal form for service on the named defendant. The Court is thus unable to proceed with service of process.

Accordingly, this action is hereby **dismissed without prejudice** for lack of prosecution.

IT IS SO ORDERED.

This 2nd day of Aug., 1995.

for Sven Erik Holmes
United States District Judge

(7)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LEONARD RENAL ROBERTS,

Petitioner,

vs.

ATTORNEY GENERAL OF THE STATE OF OKLAHOMA, et al.,

Respondent.

No. 95-C-584-H

ORDER

Petitioner has filed an application for a writ of habeas corpus, but has not submitted the proper $5.00 filing fee or a motion for leave to proceed in forma pauperis. On June 27, 1995, the Court notified Petitioner of this deficiency, but Plaintiff has failed to respond.

Accordingly, this petition is hereby dismissed without prejudice at this time for failure to pay the filing fee. See Local Rule 5.1(F). The Court may reinstate this action if Petitioner submits to the court either the proper filing fee or a motion for leave to proceed in forma pauperis within twenty (20) days from the date of entry of this order. The Clerk shall send to Petitioner a blank motion for leave to proceed in forma pauperis.

IT IS SO ORDERED.

This 2nd day of Aug, 1995.

for Thomas R. Brett

Sven Erik Holmes
United States District Judge

(2)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 2 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

WILBUR THOMPSON,

Petitioner,

vs.

RON CHAMPION,

Respondent.

No. 94-C-1162-BU

ENTERED ON DOCKET
DATE AUG 03 1995

ORDER

This matter comes before the Court on Petitioner's motion to stay proceedings and for appointment of counsel (docket #10). On June 21, 1995, the Court liberally construed Petitioner's motion to stay proceedings as a motion to reconsider the April 17, 1995 order dismissing this habeas action for failure to exhaust state remedies, and granted Petitioner fifteen days to file a brief in support of his motion for reconsideration. Petitioner has failed to respond.

Accordingly, Petitioner's motion for reconsideration and for appointment of counsel (docket #10-1 and 10-2) is hereby denied.

SO ORDERED THIS 2nd day of August, 1995.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

17

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, v. 195.0 CONTIGUOUS ACRES, MORE OR LESS, IN SECTION 25-T24N-R14E; ONE 40.0 ACRE TRACT, MORE OR LESS, IN SECTION 30-T24N-R15E; AND ONE 80.0 ACRE TRACT, MORE OR LESS, IN SECTION 8-T24N-R15E, (FOR A TOTAL OF 315.0 ACRES, MORE OR LESS), ALL IN ROGERS COUNTY, OKLAHOMA, WITH ALL BUILDINGS, APPURTENANCES AND IMPROVEMENTS THEREON, Defendants.	ENTERED ON DOCKET DATE AUG 03 1995 CIVIL ACTION NO. 93-C-0039-E

FILED
AUG 2 1995
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JUDGMENT OF FORFEITURE

This cause having come before this Court upon the plaintiff's Stipulation for Forfeiture entered into by and between the plaintiff, United States of America, and H. B. Van Pelt, III, Darlene Van Pelt, and John Riddle, for the sum of One Hundred Fifteen Thousand Dollars ($115,000.00) in lieu of the defendant real property, to-wit:

> The West Half of the West Half of the East Half of the Southeast Quarter (W/2 W/2 E/2 SE/4), and the East Half of the Southwest Quarter of the Southeast Quarter (E/2 SW/4 SE/4), and the South Half of the Southwest Quarter of the Southwest Quarter of the Southeast Quarter (S/2 SW/4 SW/4 SE/4), and the Northwest Quarter of the Southeast

Quarter (NW/4 SE/4), and the South Half of the Northeast Quarter (S/2 NE/4), and the South Half of the Northeast Quarter of the Northeast Quarter (S/2 NE/4 NE/4), and the Northeast Quarter of the Northeast Quarter of the Northeast Quarter (NE/4 NE/4 NE/4), all in Section 25, Township 24 North, Range 14 East of the Indian Base and Meridian, according to the Government Survey thereof, containing 195.0 acres, more or less;

and

The Southwest Quarter of the Northwest Quarter (SW/4 NW/4) of Section 30, Township 24 North, Range 15 East of the Indian Base and Meridian, according to the Government Survey thereof, containing 40.0 acres, more or less,

and

The West Half of the Northeast Quarter (W/2 NE/4) of Section 8, Township 24 North, Range 15 East of the Indian Base and Meridian, according to the Government Survey thereof, containing 80.0 acres more or less.

H. B. Van Pelt, III, Darlene Van Pelt, and John Riddle have entered into a Stipulation for Forfeiture in this action, wherein they agree to the payment of the sum of One Hundred Fifteen Thousand Dollars ($115,000.00) for forfeiture by the United States of America in lieu of the defendant real property, pursuant to 19 U.S.C. § 1613.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED by the Court that judgment of forfeiture be entered against the sum of One

Hundred Fifteen Thousand Dollars ($115,000.00) paid by H. B. Van Pelt, III, Darlene Van Pelt, and John Riddle, in lieu of the defendant real property, and that such sum be, and it is, forfeited to the United States of America for disposition according to law.

IT IS FURTHER ORDERED by the Court that the defendant real property be, and it is, hereby dismissed from this forfeiture action, with prejudice and without costs, and that within a reasonable time after the entry of this judgment the plaintiff will file a Release of Lis Pendens with the County Clerk of Rogers County, Oklahoma, as to the defendant real property.

S/ JAMES O. ELLISON

JAMES O. ELLISON, Judge of the
United States District Court

SUBMITTED BY:

CATHERINE DEPEW HART
Assistant United States Attorney

N:\UDD\CHOOK\FC\VANPELT\04716

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TERRY W. BATES,

Plaintiff,

vs.

MARVIN T. RUNYON, Postmaster General,

Defendant.

Case No. 94-C-902-B

O R D E R

Before the Court is Defendant's Motion to Dismiss and/or Motion for Summary Judgment (Docket #17). Defendant seeks to dismiss Plaintiff's "Veterans Preference" cause of action. Defendant also moves for judgment as a matter of law pursuant to Fed. R. Civ. P. 56, alleging there is no dispute of material facts as to Bates' claims.[1]

Plaintiff Terry W. Bates, a Rural Carrier Associate ("RCA") with the United States Postal Service ("USPS") applied for positions as a Mailhandler and a Custodian with the USPS and was denied the positions on October 1, 1993, and November 16, 1993, respectively. Bates filed this lawsuit on September 23, 1994,

[1]Plaintiff's Response to the Motion was filed without leave of Court on July 11, 1995, which is well outside the 15-day response time allowed under the local rules. "Failure to timely respond will authorize the court, it its discretion, to deem the matter confessed, and enter the relief requested." *See* Local Rule 7.1(C). Even considering Bates' Response Brief and Affidavit for the purposes of this Motion, they are woefully inadequate to controvert Defendant's undisputed facts.

alleging discrimination based upon a disability, and violation of the Veteran's Preference Act.

Bates did not specifically controvert any of Defendant's statements of undisputed facts. Local Rule 56.1 states that:

> The response brief to a motion for summary judgment ... shall begin with a section which contains a concise statement of material facts as to which the party contends a genuine issue exists. Each fact in dispute shall be numbered, shall refer with particularity to those portions of the record upon which the opposing party relies, and, if applicable, shall state the number of the movant's fact that is disputed. All material facts set forth in the statement of the movant shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the statement of the opposing party.

Bates has not provided a statement of material facts contended to be in dispute. He alleges only that: (1) Dr. Taaca (who found Bates to be medically unfit for the Mailhandler position) did not personally examine him, which is not in dispute and is irrelevant[2], and (2) that Bates is able to perform tasks required for the Mailhandler position, which is discussed below.

I. UNCONTROVERTED FACTS

1. Bates alleges that the USPS discriminated against him on the basis of physical disability when he applied for positions as a mailhandler and as a Custodian and was not hired. (Plaintiff's

[2]As Associate Area Medical Officer, Taaca does not perform any pre-placement exams. Rather, he reviews the results of physical exams performed by other physicians. (Defendant's Reply Brief, Declaration of Perry Taaca) *See* Fed.R.Evid. 703.

Amended Complaint)

2. On May 29, 1993, Bates was hired by the USPS as a Rural Carrier Associate ("RCA"). (Defendant's Exh. 2, Attachment 1)

3. Bates applied for positions as a Mailhandler, Level 4, and as a Custodian, Level 2. (Defendant's Exh. 1, at p. 10)

4. Bates suffered from a history of chronic lower back pain with decreased flexibility which resulted from a fractured back vertebra, and poor response to conservative treatment for the condition. Bates was denied medical clearance for the Mailhandler position because the job conditions would place him at a high risk for injury or aggravation of the injury. (Defendant's Exh. 1, at p. 28; Exh. 3 and Attachments 1 and 2)

5. Dr. Perry Taaca, Postal Medical Officer, suggested to Bates that he apply for less strenuous positions, and agreed that Bates would qualify medically for the positions of Custodian and Automated Mark-Up Clerk. (Defendant's Exh. 1, at p. 10)

6. The position of Mailhandler requires strenuous physical activity and includes the following duties and responsibilities:

> a. Unloads mail from trucks. Separates all mail received from trucks and conveyors for dispatch to other conveying units and separates and delivers mail for delivery to distribution areas.
>
> b. Places empty sacks or pouches on racks, labels them where prearranged or where racks are plainly marked, dumps mail from sacks, cuts ties, faces letter mail, carries mail to distributors for processing, places processed mail into sacks, removes filled sacks and pouches from racks and closes and locks sacks and pouches. Picks up sacks, pouches and outside pieces, separates outgoing bulk mails for dispatch and loads mail onto trucks.

c. Handles and sacks empty equipment; inspects empty equipment for mail and restrings sacks.

(Defendant's Exh. 2, Attachment 2)

7. The Rural Carrier Associate position involves delivery of mail from a vehicle. The duties and responsibilities of the position include:

a. Sorts mail into delivery sequence for the assigned route.

b. Receives and signs for accountable mail.

c. Loads mail into vehicle.

d. Delivers mail to customers along a prescribed route and on a regular schedule by a vehicle; collects monies and receipts for accountable mail; picks up mail from customers' roadside boxes.

e. Sells stamps, stamped paper and money orders; accepts C.O.D., registered, certified and insured mail and parcel post; furnishes routine information concerning postal matters and provides requested forms to customers.

f. Returns mail collected, undeliverable mail and submits monies and receipts to post office.

(Defendant's Exh. 2, Attachment 3.

8. Bates was not hired as a Custodian and alleges that there were three vacant custodial positions at that time, and that those positions were filled by reassignment of current employees who were nonveterans. Bates alleges that those reassignments violated the Veterans Preference Act, 5 U.S.C. § 3310. (Defendant's Exh. 1, at p. 10)

9. Bates was placed on a register, which included only veterans, for vacant custodial positions. The applicants are

ranked numerically by score and are considered for selection from the top of the register. Bates was ranked number seventeen on the register. (Defendant's Exh. 1, at p. 36)

II. SUMMARY JUDGMENT STANDARD

Summary judgment pursuant to Fed. R. Civ. P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Windon Third Oil & Gas v. FDIC, 805 F.2d 342 (10th Cir. 1986). In Celotex, the court stated:

> The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 317 (1986). To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. Conaway v. Smith, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the Defendants can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. Norton v. Liddel, 620 F.2d 1375, 1381 (10th Cir. 1980).

The Tenth Circuit Court of Appeals stated:

> Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." . . . Factual disputes about immaterial matters are irrelevant to a summary judgment determination . . . We view the evidence in a light most favorable to the nonmovant; however, it is not enough that the nonmovant's evidence be "merely colorable" or anything short of "significantly probative."
>
> * * *
>
> A movant is not required to provide evidence negating an opponent's claim . . . [r]ather, the burden is on the nonmovant, who "must present affirmative evidence in order to defeat a properly supported motion for summary judgment." . . . After the nonmovant has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in possession of the movant. (Citations omitted.)

Committee for the First Amendment v. Campbell, 962 F.2d 1517, 1521 (10th Cir. 1992).

III. LEGAL ANALYSIS

A. Mailhandler Position

Bates claims that the USPS discriminated against him by refusing to hire him for a Mailhandler position. Under the Rehabilitation Act, 29 U.S.C. § 791 *et seq.*, Bates must establish that (1) he is a handicapped person; (2) he is qualified: with or without reasonable accommodation, he is able to perform the essential functions of the job; and (3) the employer refused to hire him because of his disability. *See* White v. York International

Corp., 45 F.3d 357, 360 (10th Cir. 1995). Defendant assumes for the sake of this motion that there is a material factual dispute as to whether Bates is disabled within the meaning of the Rehabilitation Act; however, the Court does not make such an assumption.

A handicapped person is defined as one who "(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. § 706(8)(B).

Bates' Amended Complaint alleges that Defendant perceived him as being disabled, which falls under section (iii): Bates was regarded as having a physical impairment by Defendant, due to his history of back problems. "Is regarded as having such an impairment" means:

> (A) has a physical ... impairment that does not substantially limit major life activities but that is treated ... as constituting such a limitation; (B) has a physical ... impairment that substantially limits major life activates only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments defined in paragraph (j)(2)(i) of this section but is treated by a recipient as having such an impairment.

45 C.F.R. § 84.3(j)(2)(iv).

Determining whether a plaintiff is a handicapped person under the Act is decided on a case-by-case basis. Forrisi v. Bowen, 794 F.2d 931, 933 (4th Cir. 1986). The definition has two elements: (1) that the plaintiff has, has a record of having or is regarded as having a physical or mental impairment; and (2) that the

impairment substantially limits one or more major life activities. Welsh v. City of Tulsa, 977 F.2d 1415, 1417 (10th Cir. 1992). Assuming that Bates was "regarded as having" a physical impairment, the Court believes that the second prong of the test is not met. "The statutory language, requiring a *substantial* limitation of a *major* life activity, emphasizes that the impairment must be a significant one." Id., *citing* Forrisi, 794 F.2d at 933-34 (emphasis in original). While working is considered a "major life activity" under the Act, it does not necessarily mean working at the job of one's choice. Id., *citing* Tudyman v. United Airlines, 608 F. Supp. 739, 745 (D. Cal. 1984).

Numerous courts have held that "[a]n employer does not necessarily regard an employee as handicapped simply by finding the employee to be incapable of satisfying the singular demands of a particular job." Welsh, 977 F.2d at 1417-18, *citing* Forrisi, 794 F.2d at 934. *See* Jasany v. United States Postal Service, 755 F.2d 1244 (6th Cir. 1985) ("An impairment that interfered with an individual's ability to do a particular job, but did not significantly decrease that individual's ability to obtain satisfactory employment otherwise, was not *substantially* limiting within the meaning of the statute" [emphasis in original]); Daley v. Koch, 892 F.2d 212 (2d Cir. 1989) ("Being declared unsuitable for the particular position of police officer is not a substantial limitation of a major life activity"); Maulding v. Sullivan, 961 F.2d 694 (8th Cir. 1992) ("We find no error in [the] conclusion

that [plaintiff's] ailment would prevent her only from lab work, and that such a limitation does not substantially limit her employment as a whole"); Cook v. State of Rhode Island Dep't of Mental Health, 783 F. Supp. 1569 (D. R.I. 1992) (Impairment must be perceived as placing plaintiff "so far outside the norm as to make it impossible or unusually difficult ... to perform work that could be done by most other people"); Partlow v. Runyon, 826 F. Supp. 40 (D. N.H. 1993) ("Courts have uniformly rejected the notion that failure to qualify for one position renders a person 'handicapped' within the meaning of the Act").

The Tenth Circuit Court of Appeals, in analyzing cases such as Forrisi, Jasany, Maulding and Cook, stated that:

> We agree with the above-cited decisions that an impairment that an employer perceives as limiting an individual's ability to perform only one job is not a handicap under the Act. Any other interpretation would render meaningless the requirement that the impairment *substantially* limit a *major* activity. 'It was open to Congress to omit these limiting adjectives, but Congress did not do so.'

Welsh, 977 F.2d at 1419, *citing* Forrisi, 794 F.2d at 934 (emphasis in original).

These cases are particularly applicable to the instant case because, while Defendant disqualified Bates from consideration for the Mailhandler position based upon his back injury, Defendant suggested two other positions for which Bates should apply because he was medically qualified for the positions. (Defendant's Exh. 1, p. 10) Defendant rejected Bates only for the Mailhandler position; the record indicates that Defendant did not consider Bates'

disability to substantially limit his ability to work. In fact, Bates was working for Defendant as an RCA at the time he applied for the Mailhandler position.

Further, the Welsh court noted three factors that are relevant in determining whether an impairment substantially limits a plaintiff's employment potential: (1) the number and type of jobs from which the impaired individual is disqualified; (2) the geographical area to which the individual has reasonable access; and (3) the individual's job expectations and training. Id. Bates has the burden to prove that his impairment substantially limits a major life activity. However, he failed to provide evidence that he "would be precluded from performing not only the specific job for which [he] applied, but a wide range of jobs, if [his] ability to perform physical tasks was limited in the manner described by the defendant." Id. Nor did Bates provide evidence as to the geographical area to which he has access, or to his job expectations and training. Bates provides only his own affidavit, in which he states he is capable of performing the Mailhandler position. He provides no medical evidence to support his allegation. The Court holds that, as a matter of law, Bates is not a "handicapped person" for the purposes of the Act, because Defendant did not regard him as having an impairment that substantially limits one or more major life activities.

Even assuming that Bates is a "handicapped person", he does not provide evidence that he is qualified for the Mailhandler position. Courts apply a two-part test to determine whether an

individual is qualified for the position he seeks: (1) whether he can perform the essential functions of the job; and (2) if not, whether any reasonable accommodation by the employer will enable him to perform the essential functions. White, 45 F.3d at 361-362. "Essential functions" are described as "functions that bear more than a marginal relationship to the job at issue." Id. Also, the individual must be able to perform these essential functions "without endangering the health and safety of the individual or others ...." *See* 29 C.F.R. § 1614.203(a)(6).

According to the record, the Functional Purpose of the Mailhandler position is "loads, unloads and moves bulk mail and performs other duties incidental to the movement and processing of mail." (Defendant's Exh. 2, Attachment 2) In short, a Mailhandler is responsible for the physical transportation of sacks of mail.[3] The only medical information before the USPS at the time it determined Bates was ineligible indicated that Bates could not perform the essential functions of the job. *See* Defendant's Exh. 3, Attachments 1 and 2, and Exh. 2, Attachment 4. Based upon this information, Dr. Taaca determined that Bates could not perform Mailhandler duties without "high risk" to himself. There is no medical evidence in the record disputing Dr. Taaca's finding that

[3]The Functional Purpose of a Rural Carrier Associate, the position for which Plaintiff was hired, is "cases, delivers, and collects mail along a prescribed rural route using a vehicle; provides customers on the route with a variety of services." (Defendant's Exh. 2, Attachment 3) There is no evidence in the record that the two positions have equivalent physical duties; to the contrary, it appears that the Mailhandler position involves significantly more physical labor.

Bates cannot perform the essential functions of the Mailhandler position.

The Court next turns to the second step of the "essential functions" inquiry--whether reasonable accommodation would allow Bates to perform the essential functions of the job. Bates has the burden to provide "evidence concerning his individual capabilities and suggestions for possible accommodations." White, 45 F.3d at 361. According the record before the Court, Bates has provided neither evidence about his physical capabilities nor suggested accommodations. He alleges only that he can perform the functions of the job, but provides no medical evidence to contradict the medical evidence provided by Defendant.

The Court determines that Defendant is entitled to judgment as a matter of law as to this claim: Bates is not a "handicapped person" within the meaning of the Act; there is undisputed medical evidence in the record that Bates cannot perform the essential functions of the Mailhandler position; and there is no evidence of any reasonable accommodation that would allow him to perform such functions. Therefore, Defendant's Motion for Summary Judgment is GRANTED as to this issue.

B. Custodian Position

Bates alleges that Defendant violated the Veterans Preference Act, 5 U.S.C. § 3310, by reassigning three current employees who were non-veterans to custodial positions that were vacant at the time Bates, a veteran, applied for them. Defendants state that

Bates was placed on a veterans-only register for a custodial position. He was ranked number seventeen based on test scores, and vacancies are filled from the top of the list.

The Veterans Preference Act states:

> In examination for positions of guards, elevator operators, messengers, and custodians in the competitive service, competition is restricted to preference eligibles as long as preference eligibles are available.

The Veterans Preference Act applies only to competition in examinations and does not restrict such positions to veterans only. Further, 5 C.F.R. § 330.403 states that

> An agency may fill a restricted position by the appointment by noncompetitive action of a nonpreference eligible only in particular types of cases as determined by OPM. OPM shall publish in the Federal Personnel Manual a statement of the circumstances under which a restricted position may be filled by noncompetitive action.

The OPM statement to which the regulation refers states:

> 4-3. APPOINTMENT OR PLACEMENT OF NONVETERANS IN RESTRICTED POSITIONS
>
> a. Applicability of restriction. The restriction in 5 U.S.C. 3310 applies only to competition in examinations for entrance into the service, that is, to competitive examinations. This restriction could, however, be defeated to a great extent without some sort of control on filling the positions through noncompetitive action or by temporary appointment in the absence of eligibles on a register and the instructions in paragraph c have given recognition to that.[4]

[4]Paragraph c deals with when a nonveteran may be appointed to a restricted position in situations other than those listed in paragraph b. Since paragraph b applies to Bates' claim, the Court does not address paragraph c.

> b. Actions that may be taken without reference to availability of preference eligibles. An agency may fill a restricted position with a nonveteran in one of the following ways without reference to the availability of preference eligibles.
>
> (1) By position change (demotion, promotion, or reassignment) to a position in the organizational entity[] in which the nonveteran is employed or to a position anywhere which is covered by the same generic title as the one in which he is serving.
>
> (2) By the movement of a nonveteran from another agency to a position covered by the same generic title as the one in which he is serving.

To dismiss a complaint and action for failure to state a claim upon which relief can be granted it must appear beyond doubt that Plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41 (1957). Motions to dismiss under Rule 12(b), Fed.R.Civ.P. admit all well-pleaded facts. Jones v. Hopper, 410 F.2d 1323 (10th Cir. 1969), *cert. denied,* 397 U.S. 991 (1970). The allegations of the Complaint must be taken as true and all reasonable inferences from them must be indulged in favor of complainant. Olpin v. Ideal National Ins. Co., 419 F.2d 1250 (10th Cir. 1969), *cert. denied,* 397 U.S. 1074 (1970).

Bates' Amended Complaint alleges only that he applied for the Custodian position, for which he possessed 104 points. The regulations clearly show that the Veterans Preference Act applies only to competitive examinations, and that agencies may fill a restricted position by reassignment. Therefore, the Court holds that Bates's claim should be and hereby is dismissed for failure to

state a claim for which relief may be granted. The Court need not grant leave to amend when amendment would be futile. Therefore, Bates' veterans preference claim is hereby DISMISSED with prejudice.

IT IS SO ORDERED, this 1ST day of ~~July~~ Aug, 1995.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TERRY W. BATES, Plaintiff,	)	
vs.	)	Case No. 94-C-902-B
MARVIN T. RUNYON, Postmaster General, Defendant.	)	

FILED

ENTERED

DATE AUG 02 1995

JUDGMENT

In accord with the Order filed this date sustaining the Defendant's Motion for Summary Judgment, the Court hereby enters judgment in favor of the Defendant, Marvin T. Runyon, Postmaster General, and against the Plaintiff, Terry W. Bates. Plaintiff shall take nothing on his claim. Costs are assessed against the Plaintiff, if timely applied for under Local Rule 54.1, and each party is to pay its respective attorney's fees.

Dated, this 1st day of August, 1995.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

23

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO. 94-C-1077-K
	)	
THE SUM OF TWENTY-TWO THOUSAND FIVE HUNDRED TWENTY-TWO AND 86/100 DOLLARS ($22,522.86) IN UNITED STATES CURRENCY,	)	
	)	
Defendant.	)	

JUDGMENT OF FORFEITURE

This cause having come before this Court upon the plaintiff's Motion for Judgment of Forfeiture by default against the defendant currency and all entities and/or persons interested in the defendant currency, the Court finds as follows:

The verified Complaint for Forfeiture In Rem was filed in this action on the 17th day of November 1994, alleging that the defendant currency, to-wit:

THE SUM OF TWENTY-TWO
THOUSAND FIVE HUNDRED
TWENTY-TWO AND 86/100
DOLLARS ($22,522.86)
IN UNITED STATES CURRENCY,

is subject to forfeiture pursuant to 18 U.S.C. § 981, because there is probable cause to believe it is currency involved in transactions or attempted transactions in violation of 18 U.S.C. §§ 1956 or 1957, or property traceable thereto.

Warrant of Arrest and Notice In Rem was issued by the Clerk of this Court on the 29th day of November, 1994, for the arrest and seizure of the defendant currency and for publication according to law.

That the United States Marshals Service personally served a copy of the Complaint for Forfeiture In Rem and the Warrant of Arrest and Notice In Rem on the defendant currency and the known potential claimants to the defendant currency, as follows:

$22,522.86 In U. S. Currency	**Served: January 17, 1995**
Dean Jonathan Talley	**Served: January 25, 1995**
Kelley (Mrs. Dean) Talley	**Served: January 25, 1995**
Darren Ray Smith	**Served: January 25, 1995**

That Dean Jonathan Talley, Kelley (Mrs. Dean) Talley, and Darren Ray Smith were determined to be the only potential claimants in this action with possible standing to file a claim, or claims, herein to all or part of the defendant currency.

USMS 285s reflecting service upon the defendant currency and the above-named individuals are on file herein.

All persons or entities interested in the defendant currency were required to file their claims herein within ten (10) days after service upon them of the Warrant of Arrest and Notice In Rem, publication of the Notices of Arrest and Seizure, or actual

notice of this action, whichever occurred first, and were required to file their answer(s) to the Complaint within twenty (20) days after filing their respective claim(s).

No persons or entities upon whom service was effected more than thirty (30) days ago have filed a claim, answer, or other response or defense herein.

Publication of Notice of Arrest and Seizure occurred in the Tulsa Daily Commerce & Legal News, Tulsa, Oklahoma, the district in which this action is filed, on April 6, 13, and 20, 1995, and in USA Today on March 29, 1995. Proof of Publication was filed June 30, 1995.

No other claims in respect to the defendant currency have been filed with the Clerk of the Court, and no persons or entities have plead or otherwise defended in this suit as to said defendant currency, and the time for presenting claims and answers, or other pleadings, has expired; and, therefore, default exists as to the defendant currency and all persons and/or entities interested therein, and there is no known reason why judgment of forfeiture by default against all persons and/or entities having an interest in the defendant currency should not be entered.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED by the Court that judgment of forfeiture be entered against the following-described defendant currency:

THE SUM OF TWENTY-TWO THOUSAND FIVE HUNDRED TWENTY-TWO AND 86/100 DOLLARS ($22,522.86) IN UNITED STATES CURRENCY,

and that such currency be, and it is, forfeited to the United States of America for disposition according to law.

s/ TERRY C. KERN

TERRY C. KERN, Judge of the
United States District Court

SUBMITTED BY:

CATHERINE DEPEW HART
Assistant United States Attorney

N:\UDD\CHOOK\FC\TALLEY\04677

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

REBECCA E. WIDENER (LAMB),

Plaintiff,

vs.

JAMES ARTHUR WIDENER JR.,

Defendant.

Case No. 95-C-542-B

ORDER

Before the Court is Defendant James Arthur Widener Jr.'s Motion for Summary Dismissal (Docket #3). James Widener alleges that removal of this case was improper.

Plaintiff Rebecca E. Widener (Lamb) is attempting to remove a divorce and child custody case filed in 1992 in Washington County. Her *pro se* notice of removal alleges as a basis for federal jurisdiction:

> A claim by the plaintiff is founded under a claim or right arising under the Constitution, treaties or laws of the United States. Accordingly, the above described action is one which may be removed to this Court by Plaintiff, [pursuant] to the provisions of 28 U.S.C. § 1443(1).

Rebecca Widener does not specify under which federal law her claim arises. Nor does she state what relief is requested from the Court.

Lack of subject matter jurisdiction may be asserted by the Court sua sponte, at any time. Jeter v. Jim Walter Homes, Inc., 414 F.Supp. 791 (W.D. Okla. 1976). Title 28 U.S.C. § 1443, under which Rebecca Widener attempts to remove this case, clearly states

that state civil rights actions "may be removed by the defendant" if the action could have been brought in federal court. Rebecca Widener is the plaintiff in the Washington County case. Further, there is no indication in the removal notice that this is a civil rights case. Therefore, the Court determines that it has no jurisdiction. This case is hereby remanded to Washington County District Court, thereby rendering moot Defendant's Motion to Dismiss.

IT IS SO ORDERED this 1st day of August, 1995.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FRED E. BERNARD,

Plaintiff,

v.

AMERADA HESS CORPORATION,

Defendant.

Case No. 95-C-0012-B

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff and Defendant, by and through their respective attorneys, hereby jointly inform the Court that they have reached a mutually satisfactory private settlement regarding Plaintiff's claims herein, and all of Plaintiff's claims should, therefore, be dismissed with prejudice with each side to bear its own costs and attorneys' fees.

DATED this 31 day of July, 1995.

Respectfully submitted,

By: _____

Jeff Nix, Esq.
2121 South Columbia
Suite 710
Tulsa, Oklahoma 74114-3521

ATTORNEY FOR PLAINTIFF

HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON, P.C.

By: _____

J. Patrick Cremin, OBA #2013
320 South Boston Avenue, Suite 400
Tulsa, Oklahoma 74103-3708
(918) 594-0594

ATTORNEYS FOR DEFENDANT

DKM-3676

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM L. GREGORY; ANITA K. GREGORY; AMOS ADETULA; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

Civil Case No. 95 C 250K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 1 day of August, 1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear not previously claiming no interest; and the Defendants, WILLIAM L. GREGORY, ANITA K. GREGORY and AMOS ADETULA, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, WILLIAM L. GREGORY, was served with process a copy of Summons and Complaint on June 14, 1995; that the Defendant, ANITA K. GREGORY, was served with process a copy of Summons and Complaint on June 14, 1995; that the Defendant, AMOS ADETULA, signed a Waive of Summons and Complaint on April 18, 1995.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed

NOTE: THIS ORDER IS TO BE MAILED BY MOVANT TO ALL COUNSEL AND PRO SE LITIGANTS IMMEDIATELY UPON RECEIPT.

their Answers on March 30, 1995; and that the Defendants, WILLIAM L. GREGORY, ANITA K. GREGORY and AMOS ADETULA, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendants, WILLIAM L. GREGORY and ANITA K. GREGORY, are husband and wife.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Four hundred two (402), in Block thirty-three (33), in Tulsa Heights Addition to the City of Tulsa, Tulsa County, State of Oklahoma, according to the Recorded Plat thereof.

The Court further finds that on March 27, 1990, the Defendants, WILLIAM L. GREGORY and ANITA K. GREGORY, executed and delivered to HARRY MORTGAGE CO., their mortgage note in the amount of $29,450.00, payable in monthly installments, with interest thereon at the rate of 8.435 percent per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, WILLIAM L. GREGORY and ANITA K. GREGORY, husband and wife, executed and delivered to HARRY MORTGAGE CO., a mortgage dated March 27, 1990, covering the above-described property. Said mortgage was recorded on March 29, 1990, in Book 5244, Page 676-680, in the records of Tulsa County, Oklahoma.

The Court further finds that on May 18, 1990, HARRY MORTGAGE CO., assigned the above-described mortgage note and mortgage to MERCURY MORTGAGE COMPANY, INC. This Assignment of Mortgage was recorded on May 31, 1990, in Book 5256, Page 639, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 29, 1992, MERCURY MORTGAGE CO., INC., assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on September 30, 1992, in Book 5440, Page 113, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 25, 1992, the Defendants, WILLIAM L. GREGORY and ANITA K. GREGORY, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose.

The Court further finds that the Defendants, WILLIAM L. GREGORY and ANITA K. GREGORY, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreement, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, WILLIAM L. GREGORY and ANITA K. GREGORY, are indebted to the Plaintiff in the principal sum of $36,583.90, plus interest at the rate of 8.435 percent per annum from January 1, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendants, WILLIAM L. GREGORY, ANITA K. GREGORY and AMOS ADETULA, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendants, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claim no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendants, WILLIAM L. GREGORY and ANITA K. GREGORY, in the principal sum of $36,583.90, plus interest at the rate of 8.435 percent per annum from January 1, 1995 until judgment, plus interest thereafter at the current legal rate of 5.70 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, WILLIAM L. GREGORY, ANITA K. GREGORY and AMOS ADETULA, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, WILLIAM L. GREGORY and ANITA K. GREGORY, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

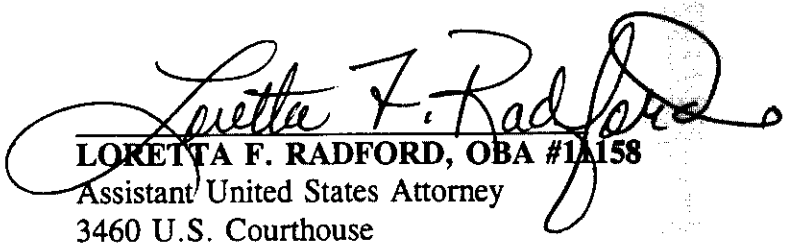
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

Judgment of Foreclosure
Civil Action No. 95-C 250K

LFR:flv

ENTERED ON DOCKET

DATE AUG 0 2 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TERRY EUGENE WINCHESTER,)
)
Plaintiff,)
)
vs.) No. 95-C-447-K
)
ED WALKER, et al.,)
)
Defendants.)

F I L E D

1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

On July 14, 1995, the Court notified Plaintiff that it would dismiss this action as frivolous pursuant to 28 U.S.C. § 1915(d) unless Plaintiff would file a motion for leave to amend and a proposed amended complaint addressing the deficiencies noted in the order. On July 26, 1995, Plaintiff filed a "Brief" realleging that his fourteen-hour confinement in a two-man cell along with seven other detainees without drinking water, a working toilet, mattress, and/or a blanket violated his constitutional rights.

Plaintiff has failed to overcome the deficiencies which this Court noted with regard to the temporary nature of his conditions of confinement at the Ottawa County Jail. See July 14, 1995 Order. Accordingly, the instant action is hereby dismissed as frivolous pursuant to 28 U.S.C. § 1915(d)

SO ORDERED THIS 1 day of August, 1995.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

10

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROBERT LLOYD MORROW,
Plaintiff, and
CHEROKEE NATION,
Plaintiff/Intervenor,

v.

THE HONORABLE DAVID WINSLOW,
Judge of the District Court
of Tulsa County, State of
Oklahoma, and
JOHN AND JANE DOE,
prospective adoptive parents,

Defendants.

Case No. 95-C-429-B

JUDGMENT

In accord with the Findings of Fact and Conclusion of Law filed this date, the Court hereby enters judgment in favor of the Defendants, The Honorable David Winslow and John and Jane Doe, and against the Plaintiffs Robert Lloyd Morrow and the Cherokee Nation. The matter concerning the adoption of Credence Monroe Grant, a minor, may proceed in the District Court of Tulsa County, Oklahoma.

Costs are assessed against the Plaintiffs, if timely applied for under Local Rule 54.1, and each party is to pay its respective attorney's fees.

Dated, this 31st day of July, 1995.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JUL 31 1995

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ROBERT LLOYD MORROW,
Plaintiff, and
CHEROKEE NATION,
Plaintiff/Intervenor,

v.

THE HONORABLE DAVID WINSLOW,
Judge of the District Court
of Tulsa County, State of
Oklahoma, and
JOHN AND JANE DOE,
prospective adoptive parents,

Defendants.

Case No. 95-C-429-B

ENTERED ON DOCKET

DATE AUG 01 1995

HISTORY OF THE CASE

This matter arose from an adoption proceeding in the District Court of Tulsa County, Oklahoma, involving an Indian child (Cherokee) born out of wedlock to a non-Indian mother and an Indian father. The issues center in whether the Oklahoma state court or the Cherokee Nation tribal court should have jurisdiction of the subject adoption proceedings and/or this Court supervise the state court concerning the adoption proceeding.

Plaintiff's Application For A Temporary Restraining Order, Preliminary Injunction and Declaratory Relief, pursuant to 28 U.S.C. §1331, §1343(3), §1391, 42 U.S.C. §1983, and the Indian Child Welfare Act (ICWA), 25 U.S.C. § 1901 et seq., was filed herein on May 11, 1995.

By Order entered May 11, 1995, this Court denied Plaintiff's Motion For Temporary Restraining Order.

On the 30th day of June, 1995, the Court conducted an

34

evidentiary hearing by agreement of the parties, relative to the merits of the action. After considering the issues raised in the pleadings, the evidence, arguments of counsel and the applicable legal authorities, the Court enters the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT:

1. Any Finding of Fact herein that may be construed as a Conclusion of Law is so considered.

2. The parties herein have filed, on June 30, 1995, a Partial Stipulation Of Facts, numbers 1-42 inclusive, which the Court adopts herein and a copy of which is attached hereto.

3. Carol Grant, a non-Indian and the biological mother of the minor Indian child, Credence Monroe Grant, timely made known her objection to transfer of this case to the tribal court both in the state court proceeding and in this Court.

CONCLUSIONS OF LAW:

1. Any Conclusion of Law herein that may be construed as a Finding of Fact is so considered.

2. This Court possesses threshold federal question jurisdiction of the parties and the subject matter herein pursuant to 28 U.S.C. §1331, §1343(3), §1391, 42 U.S.C. §1983, and the Indian Child Welfare Act (ICWA), 25 U.S.C. § 1901 et seq.. Roman-Nose v. New Mexico Dept. of Human Services, 967 F.2d 435 (10th Cir.1992).

3. Congress has determined that it is in the best interest of Indian children to protect the familial relationship, by enactment of the federal Indian Child Welfare Act, 25 U.S.C. §1901 *et seq*..

4. The State of Oklahoma has a correlative indian child welfare act, the Oklahoma Indian Child Welfare Act, 10 O.S. §40 *et seq*..

5. 25 U.S.C. §1911(b) provides that in any State court proceeding for the foster care placement of, or termination of parental rights to an Indian child, such case will be transferred to tribal court in the absence of good cause to the contrary and absent any objection by either parent.

6. Carol Grant's objection to the transfer of this case to tribal court precluded such transfer as a matter of law.

7. Carol Grant did not relinquish her parental rights in the state court proceeding but merely gave consent to adoption by John and Jane Doe pursuant to 10 O.S. §60.5.

8. Under 10 O.S. §60.16 Carol Grant's rights as a parent are not terminated until a final Decree of Adoption is entered in the state court proceeding.

9. Under 25 U.S.C. §1913(c), in any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

10. Carol Grant is a "parent" as that term is used in the ICWA. 25 U.S.C. §1903(9).

11. The mother of a child born out of wedlock has a right to custody and to change the child's residence. At all relevant times Carol Grant had both legal and physical custody of the minor child.

10 O.S. §19.

12. The Court concludes that under the ICWA and the OICWA Carol Grant had standing to and did timely object to the transfer of this case to tribal court.

13. The Court concludes there has been no showing that the state court proceeding, and the Honorable David Winslow presiding, has and/or have denied Plaintiff Robert Lloyd Morrow and the Plaintiff/Intervenor, Cherokee Nation, due process in the adoption matter of the minor child Credence Monroe Grant, nor is there any showing that such a denial of due process in imminent.

14. The Court concludes that Plaintiff Robert Lloyd Morrow's and Plaintiff/Intervenor, Cherokee Nation's, Complaint for Permanent Injunction and Declaratory Relief should be and the same is hereby DENIED.

IT IS SO ORDERED this 31ST day of July, 1995.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROBERT LLOYD MORROW,
Plaintiff, and
CHEROKEE NATION,
Plaintiff/Intervenor,

vs.

THE HONORABLE DAVID WINSLOW,
Judge of the District Court
of Tulsa County, State of
Oklahoma, and
JOHN AND DANE DOE,
Defendants.

Case No. 95-C-429-B

PARTIAL STIPULATION OF FACTS

The parties hereby stipulate that the facts of this case include the following:

1. The Cherokee Nation is a federally recognized Indian tribe which operates from its tribal headquarters located in Cherokee County in Tahlequah, Oklahoma.

2. Plaintiff Morrow and Carol Grant were married for the period between April, 1987 until October, 1990 when they obtained a divorce.

3. In February, 1994, Carol Grant informed Robert Morrow that she was pregnant with their child.

4. The minor child who is the subject of this action is Credence Monroe Grant (hereinafter referred to as "Credence"). He was born out of wedlock in Tulsa County on September 29, 1994.

5. Carol Grant is the biological mother of Credence.

6. Plaintiff Robert Lloyd Morrow is the biological father of Credence. He has acknowledged paternity prior to birth and he is recognized by the biological mother Carol Grant as the biological father.

7. Plaintiff Morrow is a citizen of the Cherokee Nation. He is an "Indian" pursuant to 25 U.S.C. 1903 (4).

8. Credence is an "Indian child" as defined by the federal Indian Child Welfare Act, 25 U.S.C. § 1903(4).

9. The Honorable David Winslow is the Judge of the District Court of Tulsa County, State of Oklahoma, who presided over case number JFA 94-267 styled "In Re the Adoption of Credence Monroe Grant", filed in the District Court of Tulsa County.

10. John and Jane Doe are non-Cherokee prospective adoptive parents who have had custody of Credence since September 30, 1994. Their identity is unknown to Plaintiff but is know to Counsel for Plaintiff. John Doe is enrolled with the Muscogee (Creek) Nation. Jane Doe is non-Indian.

11. Credence is presently residing at the Doe's address, which has been withheld from plaintiff. Credence has resided there during the past nine months.

12. Plaintiff Morrow and Carol Grant were not married and were divorced from each other at the time of the conception and birth of the minor child.

13. Carol Grant and Plaintiff Morrow are both self-employed in the copier repair business.

14. During the first trimester of her pregnancy, Carol Grant decided that she wanted to place the unborn child for adoption. She wanted an open adoption where she and her fifteen year old son could maintain contact with Credence.

15. In April, 1995, Carol Grant contacted Cherokee Nation adoption specialist, Janice Claypool, regarding a potential placement for the unborn child.

16. Carol Grant contacted Crisis Pregnancy Outreach, Inc. (Crisis Pregnancy), a private adoption agency, to seek assistance in the adoptive process.

17. Cheryl Bauman, the Director of Crisis Pregnancy, contacted on several occasions Janice Claypool, Cherokee Nation adoption specialist, who provided her with several potential Cherokee adoptive families. None of these proposed placements worked out for various reasons.

18. Through the services of Crisis Pregnancy, Carol Grant decided on the adoptive placement of the minor child with John and Jane Doe prior to the child's birth.

19. Cheryl Bauman met with Plaintiff Morrow in February 1994 to discuss adoption with him and he had no objection to the adoption and told Cheryl Bauman that while he did not favor adoption he would not fight it. Cheryl Bauman called Robert Morrow in June 1994 to discuss the adoption and again he told her he would

not fight the adoption.

20. Cheryl Bauman made efforts to locate a Cherokee family for the adoption and documented her efforts to Cherokee Nation and also provided all the information on the Does that Cherokee Nation requested. A copy of the materials furnished to Cherokee Nation is Trial Exhibit "1" and incorporated herein and filed under seal.

21. In June 1994 Janice Claypool staffed the adoption with her superior, Linda Woodward. A copy of the internal files of Cherokee Nation reflecting its staffing and approval is Trial Exhibit "2" and incorporated herein by reference and filed under seal.

22. The Does, Carol Grant and Crisis Pregnancy relied upon the approval by Cherokee Nation and the lack of objection by Robert Morrow to proceed with the placement and the adoption.

23. On September 29, 1994, Credence Monroe Grant was born.

24. On October 12, 1994, the prospective adoptive parents filed their Petition to Adopt in the District Court of Tulsa County, case JFA 94-267 styled "In Re the Adoption of Credence Monroe Grant", along with an application for a determination that Robert Morrow's consent to the adoption was not necessary.

25. On October 12, 1994, Carol Grant gave her consent to the adoption by the Does before the Honorable David Winslow. The transcript of the consent hearing is Trial Exhibit "3" and incorporated herein by reference and filed under seal. Robert Morrow never executed a written consent to the child's placement.

26. On October 12, 1994 the Court set a hearing on November 4, 1994, for determination of whether or not Plaintiff Morrow's consent was necessary for adoption. At the hearing set for November 4, 1994, Plaintiff Morrow advised Counsel for the Does for the first time that he now objected to the adoption and termination of his parental rights.

27. On November 15, 1994, when the child was six weeks old, Robert Morrow filed a "Counter-Claim" requesting custody of the child.

28. On November 18, 1994 Plaintiff Morrow filed a Motion to Dismiss on grounds that John and Jane Doe failed to comply with the ICWA.

29. In November 1994 Carol Grant contacted Linda Woodward of Cherokee Nation about Robert Morrow objecting to the adoption and asked whether Cherokee Nation was changing its mind about placement

with and adoption by the Does and was assured that Cherokee Nation had not changed its mind.

30. On November 23, 1994, the Does sent written notice of the adoption to the Cherokee Nation which was received on or about November 25, 1994.

31. On December 9, 1994, Robert Morrow filed a Motion to Transfer the adoptive case to the Cherokee Nation District Court in Tahlequah, Oklahoma. Counsel communicated to the Court that Carol Grant objected to the transfer. The motion was overruled on January 25, 1995 without an evidentiary hearing.

32. On January 9, 1995, Cherokee Nation filed a Motion to Intervene and Request for Hearing on Compliance with Placement with the ICWA and the state court allowed the intervention.

33. On January 25, 1995, in an internal document of Cherokee Nation, Bill Clark, Associate Director, ICW, Tribal Services Department, reviewed his understanding of the case of Credence Monroe Grant as follows:

"On April 20, 1994, Carol Grant inquired about Cherokee families approved as adoptive families to Janice Claypool, Adoption Specialist for ICW. The Crisis Pregnancy Outreach, Inc. of Tulsa (a private adoption agency), was working with Ms. Grant to locate a Cherokee family to adopt the baby upon its birth. The Cherokee family that she was referred to declined as they have adopted a child through the Cherokee Nation adoption program. They gave Ms Grant information about the Cherokee adoption program and who to contact."

"Janice Claypool contacted four Cherokee families and advised them of the possibility of a newborn child in need of placement some time in August, 1994."

"Adoptive homes studies were sent to Ms. Bauman after the Release of Information forms were signed by the Cherokee families. Ms. Grant read each study and selected a Cherokee family which". . . . was declined.

"Cherokee Nation did agree to the placement with the 'Doe' family".

"Mr. Morrow has apparently changed his mind in regards to relinquishing his parental rights and now has Chad Smith as his attorney. The case was staffed in December, 1994, by Chad Smith, Lisa Frazier, Linda Woodward and myself. The decision for Cherokee Nation to intervene in the court case was made by me."

"The Doe family may very well be granted permission by the District Court in Tulsa County to adopt this child. I do not see that we would object to such an adoption, providing the court grants Mr. Morrow due process and follows the ICWA provisions."

34. On January 20, 1995, Robert Morrow filed a Motion for Visitation which the court overruled on January 25, 1995.

35. The original trial date of December 16, 1994 was continued upon motion by John and Jane Doe filed on December 12, 1994, because the father had not responded to discovery and for an attorney to be appointed for the child as required by Oklahoma Law.

36. Defendant Winslow continued trial set for the following dates: January 25, 1995, (continued on motion by the Cherokee Nation that stated that Robert Morrow agreed); February 28, 1995, (continued on motion by Carol Grant, the birth mother due to her attorney's schedule conflict); March 16, 1995, (continued on motion by the child's attorney as she was in an ongoing trial; and on May 17, 1995 due to Plaintiff Morrow's filing of this suit and his request for a stay in the state case.

37. Although the state case started in October 1994 and had been duly continued from time to time and was set for disposition on May 17, 1995, Plaintiff Morrow without notice to any of the other parties waited until May 11, 1995, to file this suit and Cherokee Nation did not join in this suit until the time of hearing upon the request for a temporary injunction.

38. On the state court trial date of May 17, 1995, Plaintiff Robert Morrow requested a stay of the trial and the parties agreed the state court adoption proceeding should be stayed pending proceedings in the Federal Court. A copy of the transcript of that hearing is incorporated as Trial Exhibit "4".

39. Cherokee Nation and Robert Morrow have fully participated in the state court proceedings to include entering an appearance, filing pleadings, being involved in discovery, filing motions and attending hearings.

40. The parties to this action have not participated as a party, witness, or in any other capacity in any other litigation concerning the custody of the minor child pending in a court of this or any other state other than in case JFA 94-267 in the District Court of Tulsa County pending presently before the Honorable David Winslow in the District Court of Tulsa County. The parties to this action have no information of any custody proceeding concerning the child pending in a court in this or any other state other than the preceding mentioned case.

41. The parties to this action know of no person not a party to the proceedings who has physical custody of the child or claims to have custody or visitation rights with respect to the child except the mother, Carol Grant, Plaintiff Morrow, Plaintiff/Intervenor Cherokee Nation, and the Defendants Doe.

42. Pertinent portions of the state court record of In Re the Adoption of Credence Monroe Grant, Tulsa Court Case No. JFA 94-267, including all existing transcripts of hearings held in the case are authentic and the docket sheet of the case are Trial Exhibit "5" and are incorporated herein and filed under seal.

Submitted this 30th day of June, 1995.

Chadwick Smith, OBA # 8312
P.O. Box 9192
Tulsa, OK 74157-0192
(918) 458-9322
FAX (918) 458-4307
Pager (918) 458-8181

Robert G. Green, OBA # 3573
2420 S. Owasso Place
Tulsa, OK 74114-2642
(918) 743-0515
FAX (918) 743-6577
Attorney for Plaintiff

L. Susan Work, OBA # 3799
David A. Mullon, OBA # 6507
Lisa Frazier, OBA # 15087
Cherokee Nation Division of Law & Justice
P.O. Box 948
Tahlequah, Oklahoma 74465-0948
(918) 456-0671, ext. 620
FAX (918) 456-6142
Attorneys for Plaintiff/Intervenor

Michael E. Yeksavich, OBA #9948
4821 S. Sheridan, Suite 208
Tulsa, OK 74145-5788
Attorney for Defendants

Luke Goodwin, OBA #3457
P.O. Box 521166
Tulsa, Oklahoma 74152-1166
Attorney for Carol Grant

grant.sti

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THOMAS R. HUTCHINSON and ANNE E. HUTCHINSON,

Plaintiffs,

vs.

RICHARD B. PFEIL, MARY JOAN PFEIL, ART SERVICES INTERNATIONAL, INC., WILLIAM H. GERDTS, DAVID BERNARD DEARINGER, SONA JOHNSTON,

Defendants.

Case No. 94-C-711-E

O R D E R

Now before the Court is the Motion to Dismiss of the Defendants Richard B. Pfeil and Mary Joan Pfeil (Docket #6), the Motion to Dismiss of the Defendant Sona Johnson (Docket #10), the Motion to Dismiss of the Defendant Art Services International, Inc. (Docket #33), and the Motion for Summary Judgment of the Defendants Richard B. Pfeil, Mary Joan Pfeil, Art Services International, Inc., William H. Gerdts, and David Bernard Dearinger (Docket #45).

Plaintiffs' bring this claim, alleging that misrepresentations concerning the "E.M.J. Betty," a painting owned by the Pfeils, made in the exhibition catalogue, Masterworks of American Impressionism from the Pfeil Collection violate the Lanham Act. The catalogue was prepared in 1990 by William Gerdts and his research assistant David B. Dearinger at the request of Richard Pfeil. The catalog was prepared to accompany an exhibition of the Pfeil collection which was arranged by the Pfeils and Art Services International (ASI). ASI also had the task of editing the catalogue. The catalogue contained information provided by Sona Johnston, an art

101

historian, in response to inquiries from Dearinger.

Plaintiff claims that there is more than one "E.M.J. Betty", and asserts that the Masterworks catalogue contains misrepresentations concerning the "E.M.J. Betty" owned by the Pfeils: 1) that the Pfeils' painting was signed and dated by Theodore Robinson; 2) that the Pfeils' painting was exhibited at Macbeth Gallery and the Cotton States Exposition in 1895; 3) that the Pfeils' painting was sold to G. Schirmer as Lot 73 at the Theodore Robinson Estate sale; 4) that Theodore Robinson finished the Pfeils' painting; and 5) that the Pfeils' painting is a painting Robinson viewed as a finished work worthy of being exhibited and offered for sale.

Plaintiffs' claim is based on Section 43 of the Lanham Act, 15 U.S.C. §1125, which provides in pertinent part:

> Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which--(a) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval or his or her goods, services, or commercial activities by another person, or (b) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

The Pfeils argue that Plaintiffs' claims should be dismissed for failure to state a claim, for lack of personal jurisdiction, and improper venue. Sona Johnston argues that she has insufficient

contacts with the state of Oklahoma for personal jurisdiction, that she has made no false or misleading statements for a commercial purpose, that the Plaintiffs have no standing for a Lanham Act claim, that the plaintiffs have failed to join indispensable parties, and that the Plaintiffs' claim is barred by the statute of limitations. The Pfeils, ASI, Gerdts and Dearinger filed a motion for summary judgment, arguing that the Plaintiffs have no standing because they cannot show that they have been or likely will be damaged.

Discussion

A motion to dismiss is appropriate when "it appears beyond doubt that the plaintiff could prove no set of facts entitling it to relief." Ash Creek Mining Company v. Lujan, 969 F.2d 868, 870 (10th Cir. 1992) (citations omitted). The complaint must be construed in favor of plaintiff, and all material allegations accepted as true. Id.

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265, 274 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Windon Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

> "The plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient

> to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986).

Because the issue of standing is dispositive, and because Defendants present undisputed facts in support of their argument on standing, the Court will consider the motion for summary judgment first. The Defendants argue that Plaintiffs have no standing to bring suit under the Lanham Act because Plaintiffs cannot show that they have been or are likely to be damaged. The Defendants[1] rely on the undisputed fact that Plaintiffs admit that they do not have the "real E.M.J. Betty," have never seen the "real E.M.J. Betty" or a copy of the "real E.M.J. Betty" and do not know who is in possession of the "real E.M.J. Betty".

With respect to standing on a §1125 claim, the Tenth Circuit has recently held that "to have standing for a false advertising claim, the plaintiff must be a competitor of the defendant and allege a competitive injury." Stanfield v. Osborne Industries,

[1] The motion for summary judgment was filed on behalf of all Defendants except Sona Johnston. Johnston, however, made the identical argument regarding standing in her motion to dismiss.

Inc., 52 F.3rd 867 (10th Cir. 1995)[2]. In finding that the plaintiff did not have standing in that case, the court noted that plaintiff "is not now, nor has he ever been, in competition with defendants." Id. The Stanfield Court also noted that "the mere potential of commercial interest in one's family name is insufficient to confer standing." Id. Thus, the potential of competition is not sufficient to confer standing.

Plaintiffs argue, relying on Solomon R. Guggenheim Foundation v. Lubell, 77 N.Y. 2d 311, 569 N.E. 2d 426, 567 N.Y.S. 2d 623 (1991), that they can establish ownership of the "real E.M.J. Betty" and are therefore competitors with standing to bring this claim. Plaintiffs also assert that the complaint must be construed in the light most favorable to Plaintiff, and that the amended complaint does allege competition. Plaintiffs, however, miss the point. Defendants presented undisputed evidence that calls into question Plaintiffs standing and Plaintiffs are unable to refute that evidence.

The fact that Plaintiffs can establish ownership of the "real E.M.J. Betty" does not, alone, satisfy the requirements of standing. Plaintiffs do not now, and have not in the past competed with the Pfeils. Moreover they do not know the location of the "real E.M.J. Betty" which would allow them to compete with the Pfeils at this time. In fact, they do not know that the "real E.M.J. Betty" exists at this time. The potential of competition is

[2] There are two types of claims under section 1125: false advertising and false association. See Stanfield, 52 F.3d, at 873. Plaintiff's claim is for false advertising.

insufficient to confer standing, particularly when the potentiality is as speculative as it is in this case. See Stanfield, 52 F.3d at 873.

Defendants' Motion for Summary Judgment (Docket #45) is granted.

IT IS SO ORDERED THIS 31st DAY OF JULY, 1995.

JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THOMAS R. HUTCHINSON and ANNE E. HUTCHINSON,

Plaintiffs,

vs.

RICHARD B. PFEIL, MARY JOAN PFEIL, ART SERVICES INTERNATIONAL, INC., WILLIAM H. GERDTS, DAVID BERNARD DEARINGER, SONA JOHNSTON,

Defendants.

Case No. 94-C-711-E

J U D G M E N T

In accord with the Order filed this date sustaining the Defendant's Motion for Summary Judgment, the Court hereby enters judgment in favor of the Defendants, Richard B. Pfeil, Mary Joan Pfeil, Art Services International, Inc, William H. Gerdts, David Bernard Dearinger, and Sona Johnston, and against the Plaintiffs, Thomas R. Hutchinson and Anne E. Hutchinson. Plaintiffs shall take nothing of their claim. Costs and attorney fees may be awarded upon proper application.

Dated, this 31st day of July, 1995.

JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

107

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JIMMY LEGATES	)	
	)	
Plaintiff,	)	
	)	
v.	)	NO. 94-C-117-M
	)	
DONNA E. SHALALA,[1]	)	
Secretary of Health and	)	
Human Services,	)	
Defendant.	)	

ORDER

Plaintiff, Jimmy Legates, seeks judicial review of a decision of the Secretary of Health & Human Services denying Social Security disability benefits.[2] In accordance with 28 U.S.C. §636(c)(3) the parties have consented to proceed before the undersigned United States Magistrate Judge, any appeal of this decision will be directly to the Circuit Court of Appeals.

The role of the court in reviewing the decision of the Secretary under 42 USC § 405(g) is to determine whether there is substantial evidence in the record to support the decision of the Secretary, and not to reweigh the evidence or try the issues *de novo*. *Sisco v. U.S. Dept. of Health and Human Services*, 10 F.3d 739, 741 (10th Cir. 1993). In order to determine whether the Secretary's decision is supported by substantial evidence, the court must meticulously examine the record. However, the court may not substitute its discretion for that of the

---

[1] *Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. However, this Report and Recommendation continues to refer to the Secretary because she was the appropriate party at the time of the underlying decision.*

[2] *Mr. Legates' April 3, 1992 application for disability benefits was denied July 22, 1992, the denial was affirmed on reconsideration, October 2, 1992. A hearing before an Administrative Law Judge was held March 18, 1993. By order dated July 28, 1993, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on December 7, 1993. The decision of the Appeals Counsel represents the Secretary's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.*

Secretary. *Musgrave v. Sullivan*, 966 F.2d 1371, 1374 (10th Cir. 1992). If supported by substantial evidence, the Secretary's findings are conclusive and must be affirmed. *Richardson v. Perales,* 402 U.S. 389, 390, 91 S.Ct. 1420, 1422, 28 L.Ed.2d 842, (1971). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* at 401, 91 S.Ct. at 1427.

The entire record of the proceedings before the Social Security Administration has been meticulously reviewed by the Court. The Court incorporates the ALJ's statement of facts, findings and legal analysis into this order, except as otherwise noted.

Plaintiff alleges that ALJ did not properly weigh the opinions of his treating physicians; that the ALJ improperly assessed the Plaintiff's credibility; that the ALJ failed to adhere to proper procedures; that the ALJ ignored certain impairments in framing hypothetical questions to the vocational expert; and that the record does not support the determination of the Secretary by substantial evidence.

Generally, the ALJ must give substantial weight to the reports and findings of a disability claimants' treating physician. However, a treating physicians' opinion may be rejected if it is brief, conclusory and unsupported by medical evidence. Specific, legitimate reasons for rejection of the opinion must be set forth by the ALJ. *Frey v. Bowen,* 816 F.2d 528 (10th Cir. 1987). In this case the ALJ assigned reduced weight to the opinions of several treating physicians because they pre-date the alleged date of disability, July 19, 1991. In addition, the ALJ stated that Dr. Whittenberg's evidence was contradictory, inconsistent with Plaintiff's own testimony, and based on vocational principles rather than medical ones [R. 23]. At the hearing counsel for Plaintiff acknowledged a "chronic problem" with Dr. Whittenberg's medical records,

"they are very hard to read and he does not have good documentation." [R. 100]. The Court finds that the ALJ appropriately determined that the opinions of the Plaintiff's treating physicians were entitled to reduced weight.

There is no support for Plaintiff's claim that the ALJ failed to apply the appropriate standards in the evaluation of his pain and credibility. The Secretary is entitled to examine the medical record and to evaluate a claimant's credibility in determining whether the claimant suffers from disabling pain. *Brown v. Bowen*, 801 F.2d 361, 363 (10 Cir. 1986). Credibility determinations made by an ALJ are generally treated as binding upon review. *Talley v. Sullivan*, 908 F.2d 585, 587 (10th Cir. 1990). The ALJ listed the guidelines set forth in *Luna v. Bowen*, 834 F.2d 161, 165 (10th Cir. 1987), 20 C.F.R. 404.1529(c)(3), 20 C.F.R. 416.929(c)(3), and Social Security Ruling 88-13 and appropriately applied the evidence to those guidelines. The Court finds that the ALJ evaluated the record, Plaintiff's credibility and allegations of pain in accordance with the correct legal standards established by the Secretary and the courts.

Plaintiff has alleged that the hearing procedures were unfair. The record reflects that the hearing commenced at 9:00 a.m. and, because of the length of the hearing and the scheduling of other hearings, Mr. Legates' hearing was recessed mid-morning and continued to 4:00 p.m. the same afternoon [R. 37, 69-70]. Dr. Harold Goldman testified in the morning sessions as a medical expert whose attendance was secured by the ALJ [38]. Dr. Goldman had completed testifying and had been cross-examined by Plaintiff's counsel well before the conclusion of the morning session. Dr. Goldman was not present for the afternoon session [R. 70]. The record reflects that after the conclusion of the morning session, Plaintiff wanted to ask Dr. Goldman

another question but because Dr. Goldman was not at the afternoon session was unable to do so [R. 98]. At the hearing the ALJ specifically asked, "is there anything you want to do to try to take care of that problem or any other suggestion?" [R. 99]. Counsel for Plaintiff did not request a continuance or to submit an interrogatory to Dr. Goldman. The only request was that Plaintiff be allowed to submit a residual functional capacity evaluation and additional documentation from Dr. Whittenberg, which request the ALJ granted [R. 99-101]. The Court finds no irregularity in the proceedings.

The Court does find merit to Plaintiff's objection to the ALJ's step-5 evaluation. The ALJ's decision recites that the following limitations were related to the vocational expert,

> "reduced grip strength; . . . there would be no unprotected heights, being around moving machinery, exposure to marked changes in temperature or humidity, driving automotive equipment, or exposure to dust, fumes, and gases . . ." [R. 28].

In fact, the hypothetical to the vocational expert related the following limitations:

> No problem using his hands or feet. Only infrequent bending, squatting, crawling. Frequent climbing and reaching. No environmental restrictions, just a mild hearing loss. No over-the-road truck driving due to the medications and the codeine that he's taking, side effects of the medication. He could drive locally. There would be no mental restrictions. . . [R. 81].

The ALJ's hypothetical makes no mention of any restraints related to heights, moving machinery or exposure to humidity, dust, fumes or gases. *Id.* Yet, in the ALJ's decision, finding number 7 specifically includes these limitations as reductions to Plaintiff's residual functional capacity for medium work [R. 29]. *Hargis v. Sullivan,* 945 F.2d 1482, 1492 (10th Cir. 1991) provides that "testimony elicited by hypothetical questions that do not relate with precision all the claimants' impairments cannot constitute substantial evidence to support the Secretary's

decision." The Court finds that the ALJ's hypothetical question to the vocational expert did not precisely relate all of Plaintiff's impairments as they are listed in the ALJ's findings[3]. Therefore, according to *Hargis* the ALJ's decision which relies upon the vocational expert's testimony is not supported by substantial evidence and must be REMANDED.

The decision of the Secretary is **REVERSED** and REMANDED for clarification of the Plaintiff's residual functional capacity and for re-evaluation under proper questioning of a vocational expert.

SO ORDERED THIS 31ST day of JULY, 1995.

Frank H. McCarthy
FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

[3] *The problem in this case is that the limitations in the ALJ's decision do not correspond to the hypothetical question, and case law therefore requires a remand. To the extent the ALJ's findings exceed the limitations posed to the vocational expert, the Court questions the accuracy of those findings. In asking the hypothetical the ALJ specifically stated that he was using the restrictions outlined by Dr. Goldman [R. 81]. Dr. Goldman found no difficulty with noxious fumes, no problems being around machinery, and no problem with marked changes in temperature or humidity [R. 46-7].*